

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
COMMENCING, APRIL, 1842.

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**PRESENT :**

**HON. FRANÇOIS XAVIER MARTIN.**  
**HON. HENRY A. BULLARD.**  
**HON. ALONZO MORPHY.**  
**HON. EDWARD SIMON.**  
**HON. RICE GARLAND.**

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MAGDELAINE MICHELLE BONNEAU v. BENJAMIN POYDRAS.

Where in an action by a married woman, defendant excepts on the ground that plaintiff was not authorized by her husband or by a court, the only effect of the exception, if sustained, is to require the plaintiff to exhibit her authorization before proceeding farther with the case. It is immaterial at what time such authority may be obtained and produced, provided it be before the trial of the case on its merits. C. P. 320, 321.

Foreign laws must be proved as facts. In the absence of proof of what they are, our own laws must govern.

A married woman, separated in bed and board, may, under the laws of this state, sue without the authorization of her husband or a court. Proof of the existence of the judgment of separation, is all that is requisite to establish her authority. C. C. 125, 2410. Act of 1 April, 1826, § 2.

Where the rights of a party to a succession, consist only in a right to a portion of the proceeds of the sale of the property, either in money, or in notes given for the price,

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it will be considered purely movable; and this, though the notes should be secured by mortgage on the real estate sold. C. C. 466, 467.

The provision of art. 463, of the Civil Code, making an action for the recovery of an entire succession, an immovable, relates only to the action given to the heir to recover an entire succession in kind, such as it existed at the time it was opened. It does not apply to an universal legatee, or legatee under an universal title, limited to claiming the movable part of a succession, or a portion of the residue thereof, and not entitled to take possession of the estate in kind, in the condition in which it was at the opening of the succession.

The capacity to dispose of real property must be determined by the *lex rei sitæ*.

Under art. 2410 of the Civil Code, a wife, separated in property, may dispose of her claim to a portion of the proceeds of the sale of the property of a succession, without the consent of her husband.

The power to sell or compromise, must be express and special. C. C. 2966.

The partial execution of an obligation against which an action of nullity, or rescission would lie, subsequently to the period at which it might have been validly confirmed or revoked, if voluntary, is a tacit confirmation. C. C. 2252.

One who is notified that a contract has been made for him, subject to his ratification, by another pretending to have authority for that purpose, will be presumed to have ratified it, unless he repudiates it immediately after being notified thereof.

APPEAL from the District Court of Pointe Coupée, *Nicholls, J.*

Magdelaine Michelle Bonneau, a married woman, separated from bed and board, and in property, residing in Nantes, in France, represents that she is a niece and one of the heirs of Julien Poydras, who died in this state, in 1824, leaving a will by which he gave the residue of his estate, after the payment of certain legacies, to his nephews and neices. That the succession consisted of real and personal property in this state, and in New York. That the executors had sold a greater part of the estate. That from an account of their administration rendered by them, in the year 1837, it appeared that they had received \$1,297,845 40, of which sum \$806,780 22 had been paid, in unequal portions, to the heirs of the deceased. That it appears from the accounts of the executors that certain real estate in the cities of New Orleans and New York, a plantation in the parish of St. Bernard with the slaves attached thereto, and other property, remain unsold. That no partition or settlement of the succession has ever been made. That the portions of the different heirs have never been judicially determined. That the defendant, Benjamin Poydras, one of the heirs, took possession of the unsold property and other effects of the succession, immediately after the executors had rendered their ac-

counts as above mentioned. That he has continued ever since to enjoy the fruits and revenues thereof, and to collect the debts due thereto, without having rendered any account. That he received a balance in money, and a large amount of notes, &c., due to the estate, of which he has rendered no account. That the defendant claims to be the owner of the share of the succession belonging to the petitioner, in virtue of a compromise entered into between him and Pelagie Marie Mourain, petitioner's sister, before a notary, in the city of New Orleans, on the 14th July, 1829, by which the latter undertook for herself, and as the agent of the petitioner, to transfer to the defendant, her own and the petitioner's share in the succession of their uncle, and that he also relies on an alleged ratification of the compromise by the petitioner, in certain letters subsequent thereto. The plaintiff alleges that at the date of the compromise and of the letters, she had not been separated in bed and board from her husband; that her sister had no authority from her to make any such agreement, and that she herself had never been authorized either by her husband or by any court of justice to make such a compromise, or to ratify it; and that the title of the defendant is, therefore, null. She prays that the agreement may be rescinded; a partition of the succession decreed; an inventory and appraisement of the remaining property ordered; and the defendant condemned to render an account of the money and other property received by him.

The defendant denied, generally, the allegations of the petition, and particularly plaintiff's right to institute the suit; alleged that since the compromise of the 24th July, 1829, she had ceased to have any claim upon the succession of her uncle; that P. M. Mourain had been fully authorized to execute the act of compromise; that the act had been since approved by the plaintiff, and was highly advantageous to her. That if the court should be of opinion that the plaintiff had no authority to execute, or to ratify the compromise, the parties should be restored to the condition in which they were before its execution. That at the sale of the effects of the late Julien Poydras, on the 14th of March, 1825, P. M. Mourain purchased property, for herself and the plaintiff, jointly, to the amount of \$128,000, for which she gave four notes for \$32,000 each, payable at one, two, three and four years, from the

18th March, 1825, secured by a mortgage importing a confession of judgment, on the property so purchased. That the purchase was subsequently ratified by the petitioner, who has never paid any portion of the price ; and that her inability to do so was one of the causes which led to the execution of the compromise and the transfer of her own and her sister's rights in the succession of Julien Poydras to the respondent. That in consideration thereof, the petitioner and her sister were released from all debt to the succession for the said purchase, and the mortgage reserved thereon to secure the price was raised. That since the purchase the petitioner has caused her share thereof to be separated from her sister's, and has disposed of a part of it. That in case the compromise should be set aside, the respondent, as one of the heirs of Julien Poydras, and the representative of the rest, will be entitled to enforce the mortgage given to secure the price of the property sold to the petitioner and her sister. The respondent prays that the compromise may be declared valid, and the petition dismissed with costs ; but in case it should be annulled, that the petitioner may be condemned in reconvention to pay him the sum of \$64,000, her share of the price of the property purchased, with legal interest from the maturity of the notes given for the price ; and that the property may be declared subject to the vendor's privilege ; and for general relief.

The evidence establishes that Julien Poydras died in 1824, leaving an olographic will, by which, after a number of special legacies, he bequeaths the residue of his property of every kind whatsoever, of which he may die possessed, to his nephews and nieces, in equal portions. He directed all his landed estate and slaves, not specially bequeathed, to be sold within three months after closing the inventory of his succession, at one, two, three, and four years credit ; and that the legacies should be paid at the end of five years from the time of his death, until which time his executors were to retain the seisin ; recommending to them, however, to pay the particular legacies, *only*, sooner, should there be funds to do so.

Soon after the death of Poydras, Pelagie Marguerite Mourain, one of his nieces and legatees by universal title, arrived in this state, the bearer of a power of attorney from the plaintiff, another

niece and legatee, dated the 18th of September, 1824. She subsequently received another power of attorney, dated the 27th September, 1827. It is admitted that the plaintiff was separated in property from her husband prior to 1825. On the 23d July, 1833, a judgment was rendered separating her from bed and board.

At the sale of the property of the testator, on the 14th March, 1825, P. M. Mourain, purchased for herself and the plaintiff, a plantation, with 143 slaves, in the parish of Pointe Coupée, for \$128,000, for which she gave four notes, payable at one, two, three, and four years from the day of sale. The payment of these notes was secured by a special mortgage on the property itself, and on her own and the plaintiff's interest in the succession of their uncle. It was also stipulated, that the executors should retain these shares *à valoir au montant desdits billets et en compensation d'iceux*; that the purchasers should not alienate any portion of the property to the prejudice of the mortgage; and that if any of the notes should remain unpaid at maturity, the purchasers might be compelled to pay jointly and severally, and the plantation be seized and sold. This purchase was subsequently ratified by the plaintiff.

Several suits grew out of difficulties to which the settlement of the succession gave rise. The plaintiff and P. M. Mourain were made parties to an action commenced before the Court of Probates of Pointe Coupée, by the other legatees by universal title, against the executors. On the 25th of April, 1827, a rule was entered by consent, by which it was stipulated that the executors should file an account within fifteen days, and deliver to the plaintiffs in the suit a plantation at Terre aux Bœufs, which had been sold by the testator on a credit, and had since been taken back by the heirs under a compromise with the purchasers, and pay over the balance in their hands. The executors were, at the same time, discharged. The executors filed an account on the 16th of August following, and on the 18th of the same month delivered to the defendant, who represented nine of his co-legatees, \$20,675 in cash, the plantation at Terre aux Bœufs, a house in the city of New York, and the notes and accounts belonging to the succession. On the 5th of January, 1828, another suit was commenced before the Probate Court by the same plaintiffs, for the purpose of obtain-

ing a sale of the remaining property of the succession, which was ordered by that court to be sold for cash; but on appeal, a judgment was rendered by consent, in the Supreme Court, on the 6th April, 1829, authorizing the plaintiffs to take the plantation at Terre aux Bœufs for their own account, at \$130,000 cash. On the 12th of February, 1829, Guy Richard, as purchaser of the share of one of the legatees, and as depositary of the share claimed by a grand-niece of the testator, filed a petition in the Probate Court, praying for a provisional partition of the estate, and, among other things, that the present plaintiff, and her sister, P. M. Mourain, might be compelled to bring into the mass the large balance due on their purchase, after deducting their shares in the succession, for which they were jointly and severally bound. On the 24th of July, 1829, while this action was pending, P. M. Mourain, in her own name, and in that of the plaintiff, entered into a compromise with the defendant, Benjamin Poydras, by notarial act, by which, on transferring to the latter all their rights to the succession of the deceased, Poydras undertook to procure them a release from the payment of the price of the plantation purchased by them. The object of the present suit, is to set this compromise aside, on the ground that the plaintiff was not duly authorized to make it, either by her husband, or by a court of justice.

There was a judgment below in favor of the plaintiff. The act of compromise was ordered to be cancelled, a partition of the succession to be made, and the claim in reconvention dismissed. From this judgment, the defendant took an appeal, which was before the court in March, 1839, (13 La. 177.) The case having been remanded, to enable the parties to prove the authorizations under which they claimed, the plaintiff produced an authorization from the *Tribunal de Premiere Instance*, at Nantes, empowering her to carry on the present suit. The defendant objected to the introduction of this evidence, on the ground that the authorization was granted subsequently to the institution of the suit: that it could have no retroactive effect; that the proceedings previous to its production were consequently void; and that the existing suit should have been dismissed, and a new one commenced. These objections having been overruled, the case was tried anew,

and a second judgment rendered in all respects similar to the first, from which the defendant is appellant.

R. N. Ogden and *A. N. Ogden* for the plaintiff. In the decision previously rendered in this case, the court settled the following points :

1. That the capacity of the plaintiff, a married woman, residing in France, was to be determined by the laws of her domicil.

2. That the property embraced in the transaction of 24th July, 1829, was immoveable, and that an authorization to the wife was necessary.

3. That by the laws of France the voluntary execution of the act, after the separation from bed and board, could not be opposed to her, because her incapacity continued until the dissolution of the marriage.

The court then proceeded to inquire whether the plaintiff was ever authorized to make the transaction, or to execute it after it was made, or whether there was any act, either before or after the contract, from which such authorization would result. The conclusion was that no evidence of such authorization was to be found, and the court would have decided in favor of the plaintiff, but that the plaintiff herself had shown no authority to institute the suit, as required by the laws of her domicil. The case was, accordingly, remanded "to enable the parties to make proof of the various authorizations under which they claim."

The authority to enable the plaintiff to stand in judgment, has since been obtained, and will have the same effect as if obtained before the institution of the suit. 4 La. 259. The exception could only compel the plaintiff to produce her authorization before proceeding farther. Code Pract. 321.

The plaintiff having shown that she was separated from bed and board from her husband in 1833, was fully competent, by our laws, to sue without any authorization. The *lex fori* must govern as to the remedy, and in a suit involving the title to property in this state, if the plaintiff has, by our laws, the capacity to sue, the judgment would be binding on her, though incapable by the laws of her domicil. Story, Conflict of Laws, 468, 473.

The transaction required an authorization, though it should be considered to have been an alienation of moveables only. Civ.

Code, art. 2410. Pailliet, p. 379, note C. No. 4 to art. 1449. Civ. Code, art. 125. Code Nap. 217. Sirey, p. 56, 5 and 7. Note to art. 217.

The transaction, if viewed as an act of partition, involved the alienation of immoveables as well as of moveables, and was null for want of authorization. Merlin, Questions de Droit, Partage, § 3, p. 632. Toullier, tit. 1, chapter 6, des Successions, 4 vol. 409.

The wife cannot accept a succession without being authorized. Civ. Code, 998, 999. Toullier, 2 vol. p. 20. 6 Pothier, p. 14. Nor institute or defend a suit for the partition of the estate, and without such authorization she could not make a partition of a succession embracing immoveable property. Toullier, 4 vol. No. 408, p. 409.

Until the dissolution of the marriage, she is expressly prohibited from alienating her immoveable property without the authorization of her husband, or in default of it, the authorization of the judge. Civ. Code, arts. 2410, 2412.

When separate in estate, she can only alienate her moveables in the regular course of administration. Pailliet, p. 379, note 6 to art. 1449.

The sale of the undivided share of the plaintiff in the succession of her uncle, J. Poydras, was the sale of an immoveable. Civ. Code, art. 462. 463.

L. Janin and Mazureau, for the appellant. This case is to be examined as if brought up for the first time. Nothing was determined by the former decision, but the exception of the defendant to the plaintiff's right of action; and the remarks thrown out by the court concerning the controversy between the parties, were simply *obiter dicta*, and probably attended to with the less care, as the merits were not then properly before the court, and it was evident that the plaintiff was bound first to show her right to appear in court, before the merits of her claim could be investigated.

This case cannot be decided by the laws of France, because they are not in evidence. 12 La. 465, 589. 7 La. 539. 5 Mart. N. S. 176, 254, 270. 4 Mart. N. S. 419. 3 La. 358. 3 Mart. N. S. 149. 1 La. 255. 2 La. 154. 3 La. 36. 4 La. 382.

The difference between the French law and that of this state,

as applicable to this case, is that by the former, a woman separated from bed and board has not the right of disposing of her *immovable property*, nor, consequently, of ratifying by a voluntary execution a previous illegal alienation thereof, unless she be specially authorized by her husband or by the court, while by the law of this state no such authorization is required. It would be contrary to the policy of this state, and an unusual stretch of the comity of nations, to apply to a contract made here a disability not known to our law. Story, Conflict of Laws, 363. Ib. 366, note, and 390. 1 La. 254. 2 Mart. N. S. 98. 4 Mart. N. S. 2. 8 Mart. N. S. 221. 7 Mart. 709. Story, Conflict of Laws, 154, 156, 126, 73, 75. Civ. Code, 125. Code Pract. 106.

Admitting, for a moment, that M. Bonneau could not have made the compromise without the authorization of her husband or of a court, the question arises whether she was so authorized?

The authorization granted to her by the tribunal of her residence, is recited in her two powers of attorney to P. M. Mourain. That of 1824 contains these clauses: "*procéder à tous comptes, liquidation, et partage de ladite succession,*" &c., "*et généralement faire tout ce que la mandataire verra bien être dans l'intérêt de la comparante, quoique non expressément prévu aux présentes toutes les fois que ce qu'elle fera, tendra à la liquidation, partage, &c.*" That of 1827 approves the purchase of the plantation, authorizes M. Mourain to sue in all cases, to pay all accounts, &c.

The plaintiff, therefore, had the amplest power to proceed to the settlement and partition of the estate. A suit for a partition was pending when the compromise was made; and a married woman, thus authorized, can pass all sorts of acts which will complete the partition. Merlin, Répert. Autorization Maritale, Sect. 8, No. 4. That a sale between co-heirs is always to be considered as a partition, and subject to the same rules, has been decided in *Duplantier v. St. Pé*, 3 Mart. 155 and 138, and in a case in 11th Mart. 443.

The second power approves the purchase, and consequently all the obligations assumed by M. Mourain in the plaintiff's name, in the act of purchase. By that act the two purchasers were bound jointly and severally, not only to pay the price of \$128,000,

but its payment was secured by a mortgage, and by a pledge of their shares in J. Poydras' estate.

The plaintiff has ratified the compromise by voluntarily executing it. Civ. Code, art. 2252. Her attorney, in fact, Delamarre, sold her undivided half of twenty-two slaves at auction, under a power of attorney, which authorized him to sell, and which was given by the plaintiff under a decree of court.

She afterwards instituted an action for the partition of the plantation purchased for her, and on the 30th of April, 1834, after her separation from bed and board, her attorney in fact executed an act of partition in kind. This sale and partition would have been impossible, had the mortgage reserved on the sale to herself and sister not been raised, which was done by the defendant in pursuance of the stipulations of the compromise. The plaintiff also approved in 1835, an account which contained several charges connected with, and arising out of, the compromise.

Whether an imperfect act be void *ipso jure*, or only voidable, a distinction which, according to Duranton, vol. 13, p. 303, no longer exists, though maintained by other writers, it will be equally ratified by voluntary execution. Merlin, Questions de Droit, *verbo* Mineur, § 3. 8 Toullier, Nos. 510, 511. Merlin, Répert. *verbo* Ratification. 2 La. 520. 7 Mart. N. S. 143. 4 Mart. 78. Even a partial execution will amount to a ratification. 13 Duranton, 295. Should the plaintiff pretend that she did not know the contents of the act thus ratified, she will be bound to prove that she was ignorant of it. 8 Toullier, No. 519.

No particular form is required for the ratification of acts done by mandatories. Art. 2252 (the same as art. 1338 of the Code Nap.) refers only to obligations. Its dispositions are not repeated in art. 2979, (the same as art. 1998 of the Code Nap.) 13 Duranton, No. 265. 18 Duranton, No. 258. 3 Delvincourt, 243, note 5.

But the plaintiff was competent to execute the compromise, for she was then separated in property, and the compromise was only a sale of moveables. Civ. Code, art. 2410; see also Civ. Code, 466, 467, 470, and the French Civ. Code, art. 1449. 2 Duranton, 449. 14 Duranton, 563. 2 Toullier, 20. 1 Favard, 254. 19 Dalloz, 502. Jurisprudence du XIX Siècle, année 1827, vol. 2, 296;

année 1833, vol. 2, 371. Merlin, Répert. *verbo* Biens, § 1, No. 13. Voet, Comm. ad Pandect, lib. 2, tit. 8, No. 27.

The legatees had no right, by the testament, to the immoveables; they were to be sold by the executors. It was only a portion of the price that the testator bequeathed to them. All the property was thus sold before the compromise, except a house in New York subject to a life estate. The plaintiff's right to dispose of her share in this house, must be tested by the law admitted to prevail in New York. The capacity to dispose of real property is determined by the *lex rei sitæ*. This, according to Story, Conflict of Laws, 363, is the established doctrine. In New York a married woman may dispose of her separate estates, as if she were a *feme sole*. 5 Wheeler's Abridgment, 563. 17 Johnson's Rep. 548, (577.)

But it is said that the plaintiff transferred an immoveable right, and art. 463 of the Civ. Code is relied on to sustain this position. If the expression "*from the object to which they apply*," which occurs both in this and the preceding article, is properly weighed, it will be found that that article relates to successions of which immoveables are a component part.

The words dwelt upon by the plaintiff's counsel, to show that the plaintiff transferred an immoveable, are not found in the corresponding articles of the French Code, or in the Code of 1808. Code Nap. art. 526. Code of 1808, p. 98, art. 22. The compilers of the New Code did not intend to subvert the meaning of well known judicial terms. The heirs or legatees have a real action only when they have the right to claim real property of the estate in kind. Merlin, Questions, *verbo* Légataire, § 8. Merlin, Répert. Légataire, § 6, No. 8. For an analogous case see Civ. Code, art. 1240.

The same description of rights as were originally possessed by the plaintiff, were considered as moveables in the case of *Withers' Heirs v. His Executors*, 3 La. 363.

The expression "*universalité de biens*," is applied to such testamentary dispositions only as transfer the whole succession, or the whole residue of a succession to one person, or to several persons *jointly*, without any assignment of parts, or in other words, to forced heirs and to universal legatees. 1 Grenier, 287. 5

Toullier, 485. Civ. Code, art. 1599. It is never used in reference to legatees by universal title, such as the plaintiff, for their shares in the estate are assigned by the testament; and accretion, the distinguishing mark between universal legatees and legatees by universal title, could not have taken place between them. Civ. Code, art. 1700. 1 Proudhon, No. 702. 1 Grenier, 350. 2 Delvincourt, 341.

Even if the plaintiff had no right to dispose of this interest, it would vitiate the transaction only in relation to the house; it would remain valid as to all the other property. *Utile per inutile non vitiatur*. Civ. Code, art. 2410. Code Nap. art. 1449. 2 Duranton, 449. 14 Duranton, 563. 1 Favard, 254. 19 Dalloz, 502. Jurisprudence du XIX Siècle, année 1827, vol. 2, 296. Ib. année 1833, vol. 2, 371.

SIMON, J. This case, which, by a decision reported in 13 La. 177, was remanded for a new trial, for the purpose of enabling both parties to make proof of the various authorizations under which they claim, comes back to us in such a shape as to permit us to give a final opinion on their respective rights, and on the different points of law presented by the pleadings. We shall, however, proceed to consider them on the merits, without any reference to the former decision of this court, which, being apparently predicated on the assumption that the laws of France had been regularly proven, seems to have had for its sole object the solution of the question, whether the plaintiff's capacity to sue was to be regulated by the *lex fori*, or was to be governed by the laws of her domicile?

In conformity with that decision, the plaintiff obtained the authority of a French tribunal to enable her to stand in judgment, and on the production of the evidence of that authority, the defendant renewed his objection, on the ground that it ought to have been obtained before the institution of the suit. This point is made the subject of a bill of exceptions taken to the opinion of the inferior court, permitting the introduction of the said evidence. We think the judge *a quo* did not err. It is perfectly clear that the authorization obtained by the plaintiff, if at all necessary, must now produce the same effect as if it had existed previous to her instituting this action. Arts. 320 and 321 of the Code of Prac.

tice provide, that when a suit is brought by a married woman, without the authorization of her husband or of the court, the defendant shall not be required to answer to the merits, until the plaintiff is assisted in such a manner as to enable her to proceed regularly. This shows that the exception, if insisted on, cannot have any other effect than to require the plaintiff to exhibit her authorization before proceeding any farther in the case; and it matters not at what time such authority is obtained and produced, provided she be capable of standing in judgment at any time before the trial of the case on its merits. 4 La. 259.

The record, however, does not contain any evidence of the laws of France on that subject, and consequently as the plaintiff was separated in bed and board from her husband in the year 1833, and as this suit was instituted in April, 1838, she was fully competent, under our laws, of acting without the authorization of her husband. Civ. Code, arts. 125, 2410. Act of 1826, § 2. 1 Moreau's Digest, 227; and no other proof was requisite than that of the existence of the judgment of separation.

On the merits, it is perhaps proper to remark again that the laws of France, relied on by the plaintiff, are not in evidence, and that, therefore, under the well known rule which requires that foreign laws should be proved as facts, we cannot assume any knowledge of them; and that in the absence of proof of what those laws are, this case must be governed by our own. 1 La. 255. 2 La. 154. 12 La. 465, 589. We shall, therefore, proceed to consider the matter in controversy, as governed exclusively by the laws of Louisiana, under which, the legality and validity of the act of compromise which is sought to be annulled, and its effect or consequences, ought, in our opinion, to be tested.

The defendant's counsel, in order to resist the plaintiff's action, contends: *First*, that the plaintiff, who was separated in property from her husband, was fully capable, without his authorization, or that of a court of justice, to obligate herself by the act of compromise complained of, inasmuch as it embraced only her moveable property.

Secondly, That the powers of attorney under which her agent contracted in her name, were sufficient to bind the plaintiff; but even if originally insufficient, that the plaintiff cannot now attack

the act in question, because such insufficiency has been cured subsequently by a voluntary execution on her part, equal to an express confirmation or ratification.

I. The solution of this question necessarily requires a preliminary inquiry into the nature of the rights of the plaintiff, to the succession of her uncle. The evidence shows that Julien Poydras died in the year 1834, and that he left an olographic will, in which, after making divers special legacies in property and money, he bequeathed the balance of his estate to his nephews and nieces, by equal portions, in the following words: "*Tous les legs susdits que je viens d'établir préalablement payés et acquittés, je lègue à mes neveux et nièces existans et venus des mariages de mes trois frères et de ma sœur susdits et décédés, la généralité des biens de toute nature que je délaisserai au jour de mon décès en quelque lieu qu'ils soient trouvés ou situés, les établissant mes légataires universels par portion égale entre mes dits neveux et nièces, desquels biens ils ne pourront réclamer la jouissance et la remise que cinq ans après mon décès, par la raison que je les laisse pendant tout cet intervalle de tems entre les mains de mes exécuteurs testamentaires, et au profit de ma succession, pour les recevoir, les réaliser, &c.*" In the beginning of his will, the testator had first proceeded to order the sale of all his property, and to give his instructions to his executors, accordingly, as follows: "*Je vais établir mes volontés pour la vente de ces mêmes habitations, les esclaves en dépendant, et de toutes autres terres cultivées, on non, que m'appartiendront et que pourront m'appartenir dans l'avenir et dont ma succession se composera, à la diligence de mes exécuteurs testamentaires ci-après dénommés trois mois après la cloture de l'inventaire de mes biens, après avis, &c., mes six habitations que je viens de désigner, tous les esclaves en dépendant et toutes autres terres m'appartenant, cultivées ou en friche, seront vendues pour le prix en être payé en quatre termes égaux, &c.*" He then goes on providing for the sale of the slaves with the plantations, for their emancipation after a certain period, and imposing other conditions on the purchasers of the plantations and slaves, &c. It seems to us evident, from the above clauses and depositions, that the universal legatees had no right to take possession of any of the immoveable property of the succession, since the

same, according to the orders and instructions of the testator, was all to be sold and realized, *pour les réaliser*; and that their rights under the will, which they could not set up and enforce before the expiration of five years, were to be limited to their portions of the proceeds of the sale, after satisfaction of all the previous particular legacies. The intention of the testator, from the whole context of the will, all the clauses whereof are to be construed together, is sufficiently clear and explicit. His views were, that all his real property and slaves should be disposed of by his executors for certain purposes mentioned in the will, and those purposes would undoubtedly have been inconsistent with the power allowed to the residuary legatees to take possession of the immoveable property, if their right had not been limited and restricted to their claiming the balance of the estate *after five years*; that is to say, after all the property had been converted into money or notes. Surely, it was not in the power of the legatees to defeat the manifest object of the testator. Their rights under the will could not be exercised but in the state in which they had been put by the testator himself; and it is obvious that he never intended that they should be permitted to take any of the property in kind, and thereby prevent the full execution of his wishes and positive instructions. With this view of the testator's intentions, we cannot hesitate to say, that the rights of the plaintiff to the succession of Julien Poydras, were purely moveable, as they only consisted in her portion of the proceeds of the sales of the property, either in money or in notes proceeding from the adjudications, and ought even to be considered so, although those notes should be secured by mortgages reserved on the property sold. Civ. Code, arts. 466, 467; Merlin, Répert. *verbo* Biens, § 1, No. 13. Voët, Comm. ad Pand. lib. 1, tit. 8, No. 27.

It is urged, however, that, under art. 463 of the Civil Code, which makes an action *for the recovery of an entire succession*, immoveable, the hereditary rights of the plaintiff, though composed of moveables, are immoveable from the object to which they apply. This law, which partly corresponds to art. 22, p. 98 of the Civil Code of 1803, but which did not exist at the time of the opening of the succession, seems to us to relate only to the action which is given by law to the heir, to claim *an entire succession in kind*,

and such as it was at the time of its opening, but does not apply to the case of a residuary legatee, who can only claim his portion of the balance of the estate. According to arts. 867, 868, 869, 870 of the Civil Code, a succession is defined to be *the transmission of the rights and obligations of the deceased to the heirs*, and signifies, also, *that right by which the heir can take possession of the estate of the deceased, such as it may be*. These definitions indicate sufficiently what the law means by the terms, "action for the recovery of an entire succession," made use of in art. 463; and from an analogous case, in art. 1240, it appears to us clear, that when the right of an universal legatee, or of a legatee under an universal title, is limited to claiming the moveable part of a succession, or a portion of the residue thereof, and does not entitle him to take possession of the estate in kind, *such as it may be*, at the time the succession is opened, the law does not allow him the action alluded to in art. 462, relied on by the plaintiff's counsel.

But it is also contended that, among the property embraced in the *transaction*, the plaintiff has an interest in a plantation situated at *Terre aux Bœufs*, and in a house in New York, subject to a life estate. This, in our opinion, cannot make any change in the nature of the right of the plaintiff, such as they originally were under the will, and does not affect the validity of the act complained of. The plantation at *Terre aux Bœufs* did not belong to the succession at the time of its opening. It was subsequently taken in payment by the executors from Jourdan, *frères*, with the consent of the heirs, in consequence of a compromise with the purchasers; and was afterwards, on the 6th of April, 1829, by a decree of this court, allotted to the other ten heirs of the deceased, in payment of the sum of one hundred and thirty thousand dollars, on account of their rights against the succession. The plaintiff and her sister had, therefore, ceased to have any interest in the plantation, at the time the act in question was executed. With regard to the house in New-York, it is a well established rule that the capacity to dispose of real property is to be determined by the *lex rei sitæ*, Story, Conflict of Laws, p. 363; and in New York, where it is shown that the common law prevails, a married woman may dispose of her separate estate, as if she were

a *feme sole*. 5 Wheeler's Abridgment, 563. 17 Johnson's Rep. 548.

In the present case, the act of compromise attacked by the plaintiff, is nothing but a sale or transfer of her (moveable) rights to the succession of her uncle, for a certain consideration therein stipulated; and was made with a view, not particularly of preventing or putting an end to a law suit which might have existed between her and the defendant, but of avoiding further litigation with her co-legatees in relation to the settlement of the estate; and the question presents itself, could she make such a sale? According to art. 2410 of the Civ. Code, which is the same as art. 97, p. 342 of the Code of 1808, and art. 1449 of the Nap. Code, "The wife separated in property, *may dispose of her moveable property and alienate the same* without the consent of her husband. Toullier, vol. 2, p. 20, No. 632. Idem, 13, No. 108. Idem, 14, No. 253. Duranton, vol. 2, No. 490. Idem, vol. 14, Nos. 424, 425 and 426. Paillet, No. 2 on art. 1449. It is thus clear that, being separated in property from her husband, the plaintiff was fully capable of disposing of her hereditary rights, purely moveable, and of alienating or selling them for a valuable consideration; and on this score, the act complained of is legally binding upon her, unless it is shown that her agent acted without authority.

II. The power of attorney, dated 18th Sept. 1824, appears to have been given with a view, among other powers, of authorizing Pelagie Marguerite Mourain, "*de procéder à tous comptes, liquidation, et partage de ladite succession, &c. &c., et généralement faire tout ce que la mandataire verra bien être dans l'intérêt de la comparante, quoique non expressément prévu aux présentes toutes les fois que ce qu'elle fera, tendra à la liquidation, partage, &c.*" By the second power of attorney, dated 27th Sept. 1827, the plaintiff approves the purchase of the plantation, authorizes her sister to sue in all cases, to pay all accounts, &c. &c.; but neither of those two powers contains any special authorization to execute a sale of her rights to the succession of the deceased, or to make any compromise with respect to her right thereto. It is true P. M. Mourain had ample power to proceed to the settlement and partition of the estate, to bring suits for that purpose, and that

a suit for a partition was pending at the time the compromise was entered into ; but we cannot consider the act in question as a partition made between co-heirs under any of the powers of attorney ; nor can we say that those powers are sufficient to authorize P. M. Mourain to bind the plaintiff by the act complained of. Such powers ought to have been *express* and *special*. Civ. Code, art. 2966.

But the defendant's counsel insists that the plaintiff has ratified the act by voluntarily executing it ; and that, although no act of confirmation or ratification has been produced, her voluntary execution of it must have the same effect. According to art. 2252 of the Civ. Code, "in default of an act of confirmation or ratification, it is sufficient that the obligation be voluntarily executed, subsequently to the period at which the obligation could have been validly confirmed or ratified ;" and it now behooves us to examine from what facts and circumstances we may fairly and properly come to the conclusion that the plaintiff, by her voluntary execution of the act, has precluded herself from attacking its validity. The evidence shows, that on the 18th of March, 1825, P. M. Mourain bought for her and plaintiff's joint account, a plantation with 143 slaves, for \$128,000, for which she gave four notes, payable at one, two, three, and four years from the day of the sale, secured by a special mortgage, and also affected her own and her sister's shares in the succession, the better to secure the payment of the notes. This purchase was subsequently ratified by the plaintiff by her power of attorney of the 27th of Sept. 1827, for which purpose she was duly authorized by a competent tribunal in France. Some time after the purchase of this plantation and slaves, the settlement of the estate was prosecuted ; and owing to certain disagreements and controversies which arose between the heirs and the executors, two different suits were successively instituted for the purpose of ascertaining the portion coming respectively to each of the universal legatees, of establishing the balance due by the plaintiff and her sister on their purchase, and of compelling them to bring such balance, as they should be found to owe, into the mass of the estate. Before the final determination of the last suit, P. M. Mourain, fearing that there would be a large amount to be reimbursed by herself and her sister, conceived

that it would be advantageous to both to bring their portions in the estate to a final settlement ; and, according to the wishes expressed by the plaintiff in several of her letters, and acting under the second power of attorney, she proceeded for herself and the plaintiff to make the compromise complained of, by a notarial act, executed on the 24th of July, 1829, and thereby transferred and sold to the defendant all their rights to the estate of Julien Poydras, in consideration of his undertaking to procure them a release for the payment of the price of the plantation and slaves. Several letters written subsequently by the plaintiff show, that she was satisfied with the transaction ; and on the 11th of April, 1831, she sent a power of attorney to Delamarre, for the purpose of administering her affairs, and of selling "*par telles voies, à telles personnes, et aux prix, charges, et conditions que le mandataire jugera convenables, une habitation en sucrerie, indivise entre la constituante et Mme. Mourain, &c.*," revoking the powers by her heretofore given to her sister and to the defendant. Her attorney in fact proceeded to act under this power of attorney, and accordingly sold at auction, by virtue of the same, her undivided half of twenty-two of the slaves purchased by P. M. Mourain in 1825. On the 13th of April, 1833, an action was instituted by the plaintiff against her sister for the partition of the plantation. On the 30th of April, 1834, after her separation from bed and board, her attorney in fact executed an act of partition of the property in kind ; and on the 15th of May, 1835, the plaintiff approved a certain account containing several charges connected with and arising out of the act of compromise, such as the amount of the price of a cotton gin, mentioned in the said act. It is true that, on the 1st of Sept. 1835, the defendant agreed, in writing, to produce the vouchers in support of the account, and to account for the sums which should be found incorrect in it ; but this, it seems to us, cannot destroy the effect of the written acknowledgment of the plaintiff as to the origin of the articles therein contained. It is also necessary to notice that on the 19th of August, 1829, the mortgage reserved on the sale to P. M. Mourain and the plaintiff, had been raised by the defendant in compliance with the act of compromise ; and that the release of the mortgage enabled the plaintiff and her sister to ef-

fect the sale and partition above alluded to, which, without such release, would have been impossible.

From the above facts and circumstances, we feel no hesitation in saying, that the voluntary execution of the act of compromise complained of, on the part of the plaintiff, cannot be doubted; and it is obvious, that if the defendant had not complied with his obligation as stipulated in the act, the plaintiff would have been unable to dispose of the property by sale or otherwise. Her subsequent acts were a necessary consequence of the compromise; and cannot be considered in any other light than as evincing a manifest intention to execute it. She availed herself of all the advantages and benefit which she ever had a right to expect from the object of the act. No further claim was set up against her by the succession in consequence of the purchase of the plantation and slaves, and they were for ever released from the mortgage which had been reserved to secure the price thereof. Moreover, when she approved the account of the 15th of May, 1835, she must have been aware that the items included therein resulted from the act of compromise; and it seems to us that, having, by her own acts, changed the situation of the property, and having done acts of alienation inconsistent with the idea that she was not bound by the act complained of, it would be absolutely impossible to place the parties in the same position in which they were before the execution of the compromise. Duranton, vol. 13, No. 280, says: "*L'exécution partielle démontre, comme l'exécution totale, la volonté de confirmer l'acte vicieux; c'est une approbation tacite.*" See also Duranton, v. 13, No. 265; and Toullier, 8, Nos. 510, 511, 519 and 520, in which he says, "*Si l'exécution volontaire suffit, celui au profit de qui le contrat est ratifié par l'exécution, n'a donc rien autre chose à prouver.*" It is also a well settled principle, that "he who is notified that a contract has been made for him and subject to his ratification, by a person who pretended to have authority for that purpose, must be presumed to ratify it, unless immediately on being informed thereof, he repudiates it." 7 Mart. N. S. 143. 11 La. 288. Pailliet on art. 1985 of the Nap. Code. Now, in this case, about eight years had elapsed between the date of the transaction and the institution of this suit. There is ample proof, from the letters and other subsequent acts

of the plaintiff, that she was immediately notified of its existence. Nay, every thing shows that she was satisfied with it; that she was disposed to, and did voluntarily and effectually execute it; and it is clear to us, that if she ever intended to disavow the act complained of, it was her duty to have done so immediately on being informed of its execution. We have every reason to believe that the present suit is nothing but the result of an afterthought on her part; and if so, she cannot be entitled to any relief at our hands. We must, therefore, conclude that the plaintiff, by her acts and general conduct, has tacitly and sufficiently ratified the act of her mandatary; and that the judge *a quo* erred in not giving to it its full legal force and effect.

An attentive examination of the voluminous record which contains the provisional settlement of the state, and exhibits the real situation of the succession, has convinced us that far from having been injured by the act of compromise sought to be annulled, the plaintiff has, on the contrary, been greatly benefitted thereby; and it is, at least, doubtful whether her portion will ever amount to the one half of the price of the property which she has had the enjoyment of ever since the purchase. We cannot forbear expressing our opinion that the equity of the case is also with the defendant.

It is therefore ordered, that the judgment of the District Court be reversed; that the act of compromise attacked in this suit, be maintained; and that our judgment be for the defendant, with costs in both courts.*

R. N. Ogden and A. N. Ogden, for a re-hearing. The former judgment was conclusive, on the merits, in favor of the plaintiff, who was entitled to a final decision, on the failure of the defendant to produce any other authorizations than those introduced on the first trial, and on showing herself duly authorized to sue. The decretal part of the judgment must be construed with reference to the body of the decision, from which it appears that the case was remanded only for the purpose of receiving evidence as to the authorization of the plaintiff to bind herself by the compromise, to commence a suit. The decision, just rendered, is based on the mistaken opinion, that the right of the plaintiff to the succession of her uncle was a moveable. The court seem to have derived this opinion from the will. "The rights of the plaintiff," say the court, "were purely movable, as they only consisted in her portion of the proceeds of the sale of the property of the succession." Again: "It seems to us evident, from the above clauses and conditions, that the universal legatees had no right

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to take possession of any of the immovable property of the succession." The testator says, "*Je lègue à mes neveux et nièces existants et venus des mariages de mes trois frères et de ma sœur susdits et décédés, la généralité des biens de toute nature que je laisserai au jour de mon décès, en quelque lieu qu'ils soient trouvés ou situés.*" The following clause is the only restriction on their rights as universal heirs: "*desquels biens ils ne pourront réclamer la jouissance et la remise que cinq ans après mon décès, &c.*" It is evident from these provisions that if, at the end of five years, no sale had been made by the executors, or if the property so sold had been received back in consequence of the non-payment of the price, the property would have belonged to the heirs under the will. The decision rendered in the case of *Poydras v. Taylor et al.*, 9 La. 488, 18 La. 12, is inconsistent with the idea, that the legatees under the will of Julien Poydras, were the mere legatees of *movable property*. That was an action by the present defendant, whose rights as a legatee are the same as the petitioner's, to compel the purchaser of property at the sale of the succession of Julien Poydras to comply with the terms of the sale, and to prevent him from selling from the plantations negroes, who were, by its terms, to be considered as attached thereto, and only susceptible of alienation with the plantations themselves. The court then held that Benjamin Poydras' capacity, as an heir, authorized him to maintain the action, and to see that the conditions of the sale were strictly complied with. The rights of the heirs cannot be considered moveable, as the succession itself was composed of immovables. Though the whole estate had been converted into money, the right of the plaintiff in the succession would be an immovable, under art. 463 of the Civ. Code.

The compromise was a sale, not only of the plaintiffs hereditary rights in the succession, but of immovables belonging to it, and was void for want of authority. She was not separated from bed and board until 1833, and her acts, prior to that period, from which it has been attempted to deduce a ratification of the compromise, can produce no effect against her. The only act, subsequent to 1833, from which a ratification has been inferred, was the order to her agent for the payment, if he found it correct, of an account composed of many items, one of which was for her portion of the notarial fees which her sister had contracted to pay for the execution of the act of compromise. But this was in 1835, after the plaintiff had already sued for the rescission of the act itself. Can such an order, under such circumstances, be reasonably construed into a ratification of the compromise? In the cases of *Rivas v. Bernard*, 13 La. 159 and *Copeland v. Mickie et al.*, 17 Ib. 286, it was held, that to amount to a ratification, the acts must be of a nature to show clearly the intention to ratify; and that the ratification must be the necessary consequence of the acts.

The court have also erred in deciding that it was necessary that the laws of France should have been proved *as facts*. In the first decision, it recognized the laws of that country as governing the case, and decided it on their knowledge of those laws, as not being foreign laws, they having been in force when this state formed a part of the French empire, and, consequently, not requiring proof. The principle that such laws were not required to be proved as facts, was recognized in the case of *Malphen v. McKown et al.*, 1 La. 254.

Rehearing Refused.

Mullen and another v. Miller.

MICHAEL MULLEN and another v. ELIZA A. D. MILLER.

An error into which the jury have fallen in fixing the period from which interest is allowed, which appears from the facts found by them and from the records of the suit, may be corrected by moving for a new trial, or by an application to the judge. Where such error does not exceed the fraction of a dollar, and no attempt has been made to correct it below, the judgment will not be disturbed on appeal.

APPEAL from the Commercial Court of New Orleans. *Watts, J.*
F. B. Conrad, for the plaintiff.

Greiner, for the appellant.

MARTIN, J. The defendant is appellant from a judgment by which the plaintiffs have recovered \$372 43, with interest at five per cent. from the 6th of February, 1840, the amount of an account for goods and merchandize sold and delivered to her, which account she acknowledged to be correct, excusing herself for not immediately paying it, on the score of inability. Her counsel in this court has shown that the judgment gives interest from the sixth of February, 1840, the day on which the petition was filed, though no judicial demand was made of her until the 13th day of that month, service of the citation, as appears from the sheriff's return having been made on that day.

It is clear that interest could not run before the service of the citation.

The injury for which relief is sought at our hands, does not much exceed the third of a dollar. Had it been sought below by a motion for a new trial, or by an application to the judge to correct the error into which the jury had fallen, by reference to the facts found by them, and to the record, relief might have been obtained without difficulty. The costs of the appeal must exceed by fifty times the amount of the injury. Such a practice cannot be tolerated. *De minimis non curat lex*, is the maxim of the common law of England; *lo poco por nada se reputa*, is that of the Spanish law. The appellant may have the choice of either. We must say this court cannot relieve where the injury complained of does not exceed a fraction of a dollar, the unit of our national currency.

Judgment affirmed.

JOSEPH CHARLES DE ST. ROMES V. BROSSET BEAUREGARD.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Canon*, for the plaintiff. No counsel appeared for the appellant.

MARTIN, J. The plaintiff claims a sum of \$1866 for advertisements printed for the defendant, according to an account annexed to the petition. The answer denies the defendant's indebtedness for the whole amount of the account, on the ground of the plaintiff not having made the deduction of a *per centage*, according to the terms of his journal, and of his having charged him with a greater number of insertions than were required by law. The plaintiff had judgment for \$1399 50, with five per cent. interest, from 10th February, 1840. The defendant appealed, and the plaintiff has prayed that the judgment be so amended as to allow him the whole amount of his account. The record shows that a number of witnesses introduced by the plaintiff established frequent calls on the defendant, and as frequent admissions on his part of the correctness of the claim, accompanied with promises, at first, of payment, and afterwards of securing the debt by a mortgage, neither of which were obtained from him. On the part of the defence, no witness was introduced. It has been contended that the plaintiff, being an officer of the state, ought to have been aware that the advertisements sent to him by the defendant, were to be inserted three times only, according to the Code of Practice, art. 669, and that the deduction of the *per centage* cannot be confined to cases in which the defendant pays the costs. This deduction, as the plaintiff offered to make it, is of 25 per cent. If credit be given, the debtor may not renounce it unless the credit be for more than two and a half years, for then he would pay more than conventional interest for the delay. Nothing in the record shows that the plaintiff is an officer of the state; and since the defendant made no objection to the number of insertions with which he was charged, until he was sued, we must presume the insertions were made according to his directions. We do not think that the defendant has any right to complain; and we have not seen fit to amend the judgment for the plaintiff, because,

having deducted twenty-five per cent. from his account, we found the balance to be the exact sum which the judge *a quo* allowed him.

Judgment affirmed.

ABIJAH FISK v. DANIEL COMSTOCK and another.

One who becomes bail for another, on a guaranty from a third person to indemnify him for any loss he may be subjected to in consequence, is under no obligation to notify the latter of any steps taken to render him liable.

Bail may coerce the surrender of their principal.

BULLARD, J. The plaintiff became the bail of Tufts, upon the following guaranty of Comstock and Hyde: "We hereby promise to indemnify Abijah Fisk, and pay him for all damages he may incur, and for all expenses and charges which may be incurred in consequence of his being bound for the appearance of A. W. Tufts," &c. Having been compelled to pay the judgment against Tufts, the plaintiff instituted the present action to be reimbursed. There was judgment below against him, and he has appealed.

The defendants rested their defence upon the allegations, that the plaintiff never gave them any notice of the trial against Tufts, of the judgment against him, of the issuing and return of the *fi. fa.* and *ca. sa.*, or of the motion against the said plaintiff. They aver that when they promised to indemnify the plaintiff, it was agreed between themselves and Tufts, that in case any judgment should be rendered against him, he would forthwith return from Louisville to New Orleans and deliver himself up; and that of this agreement the plaintiff had knowledge. That before the judgment was rendered against Tufts, Fisk wrote to him at Louisville that judgment had been rendered against him, and that he (Fisk) would have to pay the money in five days; in consequence of which erroneous information, he avers, that Tufts made no further inquiry into the matter, placing entire confidence in the letter of said Fisk, and knowing his inability to reach New Orleans

Abijah Fisk v. Daniel Comstock and another.

in five days ; and they aver, that by his erroneous conduct in not giving the defendants notice, and by giving erroneous information to Tufts, they are discharged.

It appears in evidence, that on the 20th of July, Fisk wrote to Tufts, then at Louisville, that the execution was out against him for \$2500, and added, "I am told that a judgment can be obtained against me in ten days." He proceeds to remind him of his promises to save him harmless, and concludes by requesting to be informed what he intended to do in the matter. In answer to this letter, on the 8th of August, Tufts says, he was ready to start for New Orleans on that day, but that he had met Comstock, who thought it would be unnecessary to go, for if they could make him (Fisk) accountable, it would be done before he could reach there ; and observing, that if it could be put off for ten days, it could be until autumn. On the 24th of September, Fisk writes him again, that if he had started as he proposed, it would not have been too late ; but that it was then too late, as the execution would be out in eight days, and the money must be paid.

L. Peirce for the appellant.

I. W. Smith for the defendants. 1. Every act of a party to whom a promise or guaranty is given, which tends to increase the risk of the promise, or to defeat the remedy against the principal, will vacate and discharge the guarantee. 3 Chitty's Commercial Law, 324. Theobald, on Principal and Agent, 123. 2. Suretyship must be restrained within the limits fixed by the contract. It must be express, and cannot be presumed. Civ. Code, 3008. Guaranties must be construed strictly. *Bell v. Norwood*, 7 La. 103. The courts always incline to favor sureties. 13 Petersdorff, Abr. 769. *n*.

BULLARD, J. We see nothing in the correspondence of Fisk calculated to deceive Tufts to the prejudice of the defendants, or to render their condition more onerous, or to induce Tufts not to give himself up in obedience to the *ca. sa.*, so as to exonerate his bail ; on the contrary, it appears to us that Fisk intended to quicken the motions of the principal, so as to relieve himself, and consequently the defendants, from all further liability. Fisk was under no legal obligation to give notice of the steps taken to render him liable. He had a right to take out a bail piece, and to

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coerce the surrender of his principal. Instead of doing so, he makes an appeal to his honor and sense of right, and tells him that he has been told that he might be made liable in ten days for the debt. But it does not appear that Tufts understood Fisk in any other way. He says he was prepared to come to New Orleans, on receiving the letter of the 20th of July, but was induced not to do so by one of the defendants. It was not the information, therefore, which he got from Fisk, but the advice of Comstock, which prevented his returning immediately to the city. Nothing had been done, in our opinion, by Fisk, to prevent Tufts from complying with his promise; and the recourse of Comstock and Hyde upon him, in the event of their being condemned to pay, has been in no manner impaired by any conduct of Fisk.

The judgment of the court is therefore reversed, and it is adjudged that the plaintiff recover of the defendants, *in solido*, two thousand six hundred and eighty-four dollars and sixteen and quarter cents, with five per cent. interest from Dec. 4, 1835, until paid, and the costs in both courts.

JOHN WILCOX v. HIS CREDITORS.

Persons claiming a part of the estate of an insolvent, as heirs of a deceased wife, on account of the community of gains, must establish their right to recover by adequate evidence. It will not be sufficient to render it probable.

APPEAL by Clark and others, trustees, and Josiah Barker, from a judgment of the District Court of the First District, *Buchanan, J.*

BULLARD, J. The syndic of the creditors of John Wilcox having filed a tableau of distribution, on which he placed the children of the insolvent, in the right of their deceased mother, as privileged creditors for their share of the community, which was dissolved in 1828 by the death of their mother, amounting to upwards of twenty thousand dollars, and certain creditors in New York, represented by Clark, Hunt & Philips, as trustees, or mortgage creditors for \$25,206.08, and McCawley as a creditor with the vendor's privilege for a small note, various oppositions were filed, and from a judgment pronounced thereon, the present appeal has been taken.

The mortgage creditors in New York opposed the claim of the heirs of Wilcox's wife on the ground that the community was in point of fact insolvent, as well as on other technical grounds; and they also opposed the claim of McCawley, as unfounded. The heirs of Wilcox's wife on the other hand, opposed the claim of the New York creditors, alleging that in consequence of their failure to comply with the conditions of their contract, the insolvent had suffered damage to the full amount of their debt, in the sacrifice of real estate, which was sold at a forced sale in consequence of their refusal, through their agent, to consent to a private sale for the purpose of paying the previous incumbrances. The claim of the heirs was reduced to about two thousand dollars, and that of the New York creditors were rejected *in toto* by the judgment of the District Court. The argument in this court has turned mainly upon these two debts; and we shall consider the case as it relates; *first*, to the New York mortgages; *secondly*, as to the heirs of Wilcox's wife; and *thirdly*, as to McCawley's claim.

I. Wilcox being indebted to numerous persons in New-York, on the 25th October, 1834, executed in favor of certain trustees a mortgage upon several houses and lots in New Orleans to secure the payment of their debts, amounting in all to \$25,206 08, for which a great number of notes has been given which are set forth in the instrument of mortgage. In this deed, which is in the common law form, nothing is said of any previous incumbrances upon the property; but in a previous contract between the same parties, containing the preliminaries of the arrangement thus made, and which bears date the 10th of October, 1834, pre-existing mortgages are alluded to without being specified, and the trustees agreed, that notwithstanding their bond and mortgage, Wilcox should be at liberty to renew the present incumbrances by mortgages if he should think proper and feel himself constrained so to do, such renewed mortgages to have the same preference as they now have. Then comes the clause which has given rise to this controversy: "And it is further agreed by and between the said parties hereto, that said Wilcox is to be at liberty to sell any part or portion of the real estate so placed under mortgage, on his paying to the said trustees, or their attorney, or substitute, a proportion of the pur-

chase money, equal to the proportion which the whole mortgage security bears to the whole mortgage debt; and that, thereupon, the said parties of the first part, or their attorney, or substitute, shall release or extinguish their mortgage, on such property so sold."

It appears that, among others, there existed a mortgage in favor of Pritchard for about \$15,000. In the autumn of 1834, Wilcox sold one of the pieces of property in Camp street to Lee for \$11,000, but could not make a conveyance because Tulane, the agent of the trustees, refused to cancel the mortgage of his principals, unless Wilcox would pay a part of the purchase money to him in conformity to the agreement of the 10th of October. In consequence of that refusal the sale was not completed. This is the act of the trustees which is complained of as having caused great damage to Wilcox, and which damage the judge of the District Court estimated and assessed as equal to the whole balance of the debt, apparently due at the time of the trial. That was the only occasion on which Tulane, or any other agent of the creditors, declined to cancel the mortgage on any part of the property. The question then is, whether Tulane was bound, as the agent of the New York creditors, to release the mortgage under the circumstances shown by the record, and, if so, what damage did Wilcox sustain?

If the sale of the lot had been, as Sterrett, one of the witnesses, and who was the attorney of Pritchard, supposes, under an order of seizure at the suit of Pritchard upon his prior mortgage, it was idle to apply to subsequent mortgagees to give a release, because such subsequent mortgages became extinct by a judicial sale under the first. This we cannot suppose was the case; and it would seem from other testimony, that it was a sale at auction, at which Lee was the highest bidder, and probably was intended to provide for the payment in part of Pritchard's debt. The question then arises, was Tulane bound to release the mortgage of his principal upon that property, and if so, what damage did his refusal occasion to the insolvent?

The construction of that part of the agreement has been the subject of much argument and even conjecture. If we understand it, literally, it is clear that in no case were the New-York creditors

bound to release their mortgage upon a sale of the property, without receiving a part of the price. What that proportion was to be, it is difficult to understand. The contract of the 10th of October makes two distinct agreements :—*first*, as it relates to pre-existing incumbrances ; and *secondly*, as to the sale of the property by the mortgagor. To provide for prior liens, Wilcox was authorized to renew the mortgages, to novate them, or create new ones ; and such new mortgages were to take precedence of that of the New York creditors. By the second clause, he was authorized also to sell ; but upon the condition of paying over a part of the price. It may be said that the parties did not contemplate providing from the previous incumbrances by a private sale—for it would have been absurd in that case for the creditors in New York to stipulate for a part of the price unless what remained after paying the first lien. The previous mortgagees could not be expected to consent to that, and no provision is made for their concurrence. It is impossible to give effect to every part of the agreement, without supposing, that the creditors in New York intended that provision should be made for prior mortgages by facilitating Wilcox in making payments by renewing the mortgages, and that after such incumbrances should be paid off he might still have the privilege of selling at private sale, provided each creditor represented by the trustees should be paid a part in proportion to his debt. Even upon this hypothesis the obscurity is not entirely removed. But it is less important to ascertain the probable meaning of the parties, than it is to decide whether heavy damages were incurred in consequence of the agent of the trustees putting a literal construction upon the contract. In the first place, if the sale to Lee was a fair one and for a just price, and the proceeds had been paid over in extinguishment of Pritchard's mortgage, neither Wilcox nor the New York creditors would have had a right to complain, even if Tulane had not released the mortgage of his principals ; because the payment would have benefited both the parties, and especially the trustees, by enhancing the value of their pledge and giving them the precedence on the remaining property. Lee alone had reason to fear both Pritchard and the other creditors, because the price he was to pay was not sufficient even to extinguish the mortgage of the former, and the sale was not a judicial one.

But supposing Tulane to have been mistaken in his views of his duty, and of the construction of the contract, what damage did Wilcox sustain? If, on the failure of the contract with Lee, in consequence of the conduct of Tulane, the agent, Wilcox had claimed damages in a direct action against his principals, the creditors in New York, what would he have been entitled to recover? At most, we should suppose, the difference between \$11,000 and what the same property afterwards brought on a forced sale. Nothing shows that the whole mortgaged property was sacrificed, as a direct consequence of the conduct of Tulane. A new negotiation might have been opened—an appeal might have been made from the agent to the principals. Nothing of the kind appears to have been done or attempted. It does not even appear that Tulane had any assurances that the price of the lot would be appropriated to pay off Pritchard's mortgage. How could he have justified himself to his constituents if he had given the release? They may have reminded him, that according to the literal tenor of their contract, he was to release only upon certain conditions, and it was not for him to say that those conditions were absurd. If, through the fault of Tulane, his constituents are condemned to heavy damages, is it not just that they should have their recourse over against their agent? And if they were now to sue Tulane, to make up to them this loss, would he not silence their complaints by saying, that he had acted in good faith, and ought not to be punished for the obscurity or ambiguity of their own contract? They should have been more explicit. In short, from whatever point of view we regard this question, we are by no means prepared to say, that Wilcox has shown enough to entitle him to be entirely exonerated from the debts due to his New York creditors, and still less, that the other creditors are entitled to profit by it, in the form of a reconventional demand.

II. The heirs of Wilcox's wife were allowed about \$2,600, as their share of the community formerly existing between the insolvent and his wife, who died in 1828. No inventory was taken, and it is not shown that any tangible property existed at the time. But it is said by the district judge, that there appears on McDougall's books a balance in favor of Wilcox, on the first of June, of \$5,285, which was settled by cash and bills in November, 1828,

after the death of Wilcox's wife. This evidence is not, in our opinion, sufficient to establish the claims of the heirs, on account of the community of *acquets* and gains. The case is analogous to that of *Adams v. His Creditors*, 14 La. 460. No liquidation of the community is shown, and the evidence either of rights or debts is extremely vague; and parties claiming under such circumstances, must show something more than probabilities. The impression left upon our minds from an attentive consideration of all the evidence, is that the community was insolvent.

III. With respect to McCawley's claim to be set down as a mortgage creditor, for the amount of a small note of \$312, the evidence shows that he has no claim whatever. He admits himself that he has been paid the amount of the note. No person claims as subrogated to his rights in virtue of the payment.

It is therefore ordered that the judgment of the District Court be avoided and reversed, so far as it relates to the claim of the heirs of Wilcox's wife, and of Clark, Hunt & Philips, as trustees of the New York creditors; and that the tableau be further amended by striking from it the claim of the said heirs, and by reinstating Clark, Hunt & Philips, trustees, as mortgage creditors for the amount due upon the said mortgage, to wit, the sum of \$23,667 31, with interest at seven per cent. from March 27, 1841; and that the tableau in other respects remain as by the judgment of the District Court; and that thus amended it be homologated and approved. The costs to be paid by the mass.

G. B. Duncan, and *Barker*, for the appellants.

McHenry, and *Mazureau*, for the appellees.

ANANIAS DUNBAR v. THOMAS BUTLER.

APPEAL from the District Court of West Feliciana, *Johnson, J. Turner* for the plaintiff. No counsel appeared for the appellant.

BULLARD, J. This is an action for extra work done and materials furnished by the plaintiff as a carpenter. He sets forth that

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he had contracted for certain work, for a fixed price, and that both parties had complied with their contract, but that the defendant afterwards engaged him to do other and extra work, which forms the subject of the present suit. He claimed upwards of \$2,000, had a verdict for \$1500, and judgment accordingly; from which the defendant appealed, after a new trial had been refused.

The counsel for the defendant has contended in this court, that the plaintiff cannot recover in this form of action; that he ought to have sued on his contract, and not on a *quantum meruit*. But it does not appear that any express contract existed as to the price of the work, for the value of which this action is brought. The plaintiff was requested to do it, and furnished the materials. A contract for other work is recited in the petition; but it is expressly stated that nothing was due on that account.

The value of the work and materials was the only question in the case, and that was submitted to a jury. There is some discrepancy in the evidence as to the value of the work. Two witnesses estimated it, independently of a few minor items, at \$975; others at the prices charged. The jury took a middle course, and give \$1500, of which \$150 were remitted. According to the uniform practice of this Court, it does not appear to be our duty to interfere and disturb the verdict.

Judgment affirmed.

JOSEPH DESJARDIN v. PIERRE AUVRAY and Wife.

APPEAL from the District Court of the First District, Buchanan, J.

D. Seghers, for the plaintiff.

Roselius, for the appellant.

MORPHY, J. The controversy between these parties, which is in relation to a building contract and divers difficulties growing out of it, was first submitted to a jury. After a protracted trial, during which a mass of contradictory evidence was adduced, the

jury could not agree. Experts were then appointed, one by the plaintiff, and one by the defendants; they having also disagreed, Joseph Pilié, the umpire appointed by the court, made a report allowing the plaintiff a sum of \$2560 52, for the work done and materials furnished by him in the construction of the house of the defendants. On a rule taken by the plaintiff, this report of the umpire was confirmed and homologated, and judgment entered up in conformity therewith, allowing, however, to the defendants a credit for \$1500, acknowledged to have been received by the plaintiff. The defendants appealed.

They have not undertaken to show, in this tribunal, any cause why the report of the umpire should not have been homologated and made the judgment of the court below, nor do we find any specific ground taken, or objection made to the report itself, in their answer. To the rule taken for its homologation they answer only, that it does not state whether the sum fixed by the umpire is the value of the work done by plaintiff on the building, or whether it is the value of the building at the time the report was made; and they pray that the amount paid by them to one Chappel, whom they employed to finish the work and building, may be deducted from the sum fixed by the umpire. The report presents to our minds no ambiguity. The umpire had before him the reports of the two experts, who had disagreed. He declares that he found the estimate of the one too high, that of the other too low; and proceeding to give an estimate of his own, he fixes \$2560 52, as a fair compensation for such work as had been done by the plaintiff. It is clear that this did not embrace the work which defendants may have caused to be done to finish their house.

Judgment affirmed.

Hill and another v. The Phenix Tow Boat Company.

ARTEMON HILL and another v. The PHENIX TOW BOAT COMPANY.

Ships and other vessels are not susceptible of being mortgaged, except according to the laws and usages of commerce. The validity of an hypothecation of them will not be recognized in any other cases; and there is no distinction in this respect between vessels trading with foreign ports, and those which do not leave the State. Advances made to the owner, and applied to the use of a vessel, confer no privilege on the creditor. Such a claim is not embraced in any of the classes provided for by article 3204 of the Civil Code enumerating the debts privileged against ships or other vessels. The creditor is not subrogated to the rights of those whose privileged claims may have been paid out of the money advanced by him.

The object of an hypothecation bond is to procure the necessary supplies for vessels in distress in foreign ports, where the master and owners are without credit, and in cases in which, if assistance could not be procured by such means, the vessel and cargo might perish.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case was argued by *Grima* for the appellants, and by *J. F. Pepin* for the appellees.

MORPHY, J. F. de Lizardi & Co. and L. Millaudon are appellants from a judgment rejecting their claims as privileged and mortgage creditors on the proceeds of the steamers Phenix, Pilot, Shark, and Semaphore, sold on execution in this suit. In support of their opposition to the tableau of distribution of the proceeds of these boats, filed by the sheriff who made the sale, they have produced two notarial deeds of mortgage, in the ordinary form, executed for advances made and money loaned by them to the defendants. We have held that ships and vessels being moveables, are not susceptible of being mortgaged, except according to the laws and usages of commerce, and that we would recognize the validity of an hypothecation of a vessel only in those cases where it would be recognized by such laws and usages. *Malcolm et al. v. schr. Henrietta and others*, 7 La. 490; *Loze v. Dimitry, et al.*, Ib. 486; *Grant v. Fisk, et al.*, 17 Ib. 158.

Witnesses were produced by F. de Lizardi & Co. to prove that the funds arising from their loan to the defendants, were used for the payment of the most pressing claims against them, such as the wages of the hands and officers, wood bills, &c., and that

the Company could not have got along at all without this loan. From the act of mortgage, these advances appear to have been made, not for the necessities of any particular vessel, but, as the deed itself recites, "in order to facilitate the Phoenix Tow Boat Company in their affairs." The advances were to be made on the notes of the Company to the order of the lenders, duly *paraphed* by the notary, and payable at certain stated periods, and a mortgage on all the steamers belonging to the Company is stipulated to secure the punctual payment of these notes. It is impossible to view this transaction in any other light than that of an ordinary loan of money, to be secured by a mortgage. The funds have very probably been, at least partly, employed in paying debts contracted for the necessities of these boats, and to accomplish the ends for which the Company was created; but this cannot avail the lenders. In *Grant v. Fisk, et al.*, we held that a creditor for advances or loans in money made to the owner, and applied to the use of a vessel, has no privilege allowed him by law, because he is not subrogated to the rights of those whose privileged claims have been paid out of the money loaned. The claim of the appellants comes within none of the cases provided for by article 3204 of the Civil Code, by which privileges are allowed on the price of ships or other vessels. A distinction has been attempted to be drawn between ships trading with foreign ports, and those vessels which, like these steamers, ply only between the mouth of the Mississippi and New Orleans, without ever going out of the State; and it is said that a mortgage of the latter should be held valid. If any such distinction were made, it should, perhaps, be to declare that tow boats, ferry boats, and such other craft as never leave the port to which they belong, remain within the rule of our municipal law, that moveables are not susceptible of mortgage, and do not come within the exception existing under the commercial law, which gives effect to the hypothecation of ships. The reasons on which the exception is founded can hardly be made to apply to vessels of that description. "The object of hypothecation bonds," remarks Chancellor Kent, "is to procure the necessary supplies for ships which happen to be in distress in *foreign* ports, where the master and owners are without credit, and in cases in which, if assistance could not

Whitney and another v. Lyon.

be procured by means of such instruments, the vessels and their cargoes must be left to perish."

As to the claim of the other appellant, Laurent Millaudon, the evidence shows that the mortgage was given, not to secure advances made for the use and necessities of the steamer Phœnix, but to raise money in order to pay a pre-existing debt of the Phœnix Tow Boat Company to John S. Walton. This information we have from the gentleman himself, who, as President of the Company, signed the deed of mortgage.

Judgment affirmed.

SAMUEL WHITNEY and another v. THADDEUS K. LYON.

Case of *Frey v. Hebenstreit*, 1 Robinson, 561, affirmed.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case was submitted without argument.

MARTIN, J. James D. Denegre, the bail of the defendant, is appellant from a judgment discharging the rule which he had obtained against the plaintiffs, to show cause why the bail bond executed by him should not be cancelled, and himself discharged from all responsibility thereunder, the legislature of the State having, since the execution of said bond, passed an act abolishing imprisonment for debt in civil cases, whereby the arrest of the defendant became illegal and the surrender vain.

This case cannot be distinguished from *Frey and another v. Hebenstreit and another*, determined during the last month. 1 Robinson, 561.

It is therefore ordered that the judgment be reversed, and that the rule be made absolute; the appellees paying the costs in both courts.

bound to release their mortgage upon a sale of the property, without receiving a part of the price. What that proportion was to be, it is difficult to understand. The contract of the 10th of October makes two distinct agreements :—*first*, as it relates to pre-existing incumbrances ; and *secondly*, as to the sale of the property by the mortgagor. To provide for prior liens, Wilcox was authorized to renew the mortgages, to novate them, or create new ones ; and such new mortgages were to take precedence of that of the New York creditors. By the second clause, he was authorized also to sell ; but upon the condition of paying over a part of the price. It may be said that the parties did not contemplate providing from the previous incumbrances by a private sale—for it would have been absurd in that case for the creditors in New York to stipulate for a part of the price unless what remained after paying the first lien. The previous mortgagees could not be expected to consent to that, and no provision is made for their concurrence. It is impossible to give effect to every part of the agreement, without supposing, that the creditors in New York intended that provision should be made for prior mortgages by facilitating Wilcox in making payments by renewing the mortgages, and that after such incumbrances should be paid off he might still have the privilege of selling at private sale, provided each creditor represented by the trustees should be paid a part in proportion to his debt. Even upon this hypothesis the obscurity is not entirely removed. But it is less important to ascertain the probable meaning of the parties, than it is to decide whether heavy damages were incurred in consequence of the agent of the trustees putting a literal construction upon the contract. In the first place, if the sale to Lee was a fair one and for a just price, and the proceeds had been paid over in extinguishment of Pritchard's mortgage, neither Wilcox nor the New York creditors would have had a right to complain, even if Tulane had not released the mortgage of his principals ; because the payment would have benefited both the parties, and especially the trustees, by enhancing the value of their pledge and giving them the precedence on the remaining property. Lee alone had reason to fear both Pritchard and the other creditors, because the price he was to pay was not sufficient even to extinguish the mortgage of the former, and the sale was not a judicial one.

But supposing Tulane to have been mistaken in his views of his duty, and of the construction of the contract, what damage did Wilcox sustain? If, on the failure of the contract with Lee, in consequence of the conduct of Tulane, the agent, Wilcox had claimed damages in a direct action against his principals, the creditors in New York, what would he have been entitled to recover? At most, we should suppose, the difference between \$11,000 and what the same property afterwards brought on a forced sale. Nothing shows that the whole mortgaged property was sacrificed, as a direct consequence of the conduct of Tulane. A new negotiation might have been opened—an appeal might have been made from the agent to the principals. Nothing of the kind appears to have been done or attempted. It does not even appear that Tulane had any assurances that the price of the lot would be appropriated to pay off Pritchard's mortgage. How could he have justified himself to his constituents if he had given the release? They may have reminded him, that according to the literal tenor of their contract, he was to release only upon certain conditions, and it was not for him to say that those conditions were absurd. If, through the fault of Tulane, his constituents are condemned to heavy damages, is it not just that they should have their recourse over against their agent? And if they were now to sue Tulane, to make up to them this loss, would he not silence their complaints by saying, that he had acted in good faith, and ought not to be punished for the obscurity or ambiguity of their own contract? They should have been more explicit. In short, from whatever point of view we regard this question, we are by no means prepared to say, that Wilcox has shown enough to entitle him to be entirely exonerated from the debts due to his New York creditors, and still less, that the other creditors are entitled to profit by it, in the form of a reconventional demand.

II. The heirs of Wilcox's wife were allowed about \$2,600, as their share of the community formerly existing between the insolvent and his wife, who died in 1828. No inventory was taken, and it is not shown that any tangible property existed at the time. But it is said by the district judge, that there appears on McDougall's books a balance in favor of Wilcox, on the first of June, of \$5,285, which was settled by cash and bills in November, 1828,

after the death of Wilcox's wife. This evidence is not, in our opinion, sufficient to establish the claims of the heirs, on account of the community of *acquets* and gains. The case is analogous to that of *Adams v. His Creditors*, 14 La. 460. No liquidation of the community is shown, and the evidence either of rights or debts is extremely vague; and parties claiming under such circumstances, must show something more than probabilities. The impression left upon our minds from an attentive consideration of all the evidence, is that the community was insolvent.

III. With respect to McCawley's claim to be set down as a mortgage creditor, for the amount of a small note of \$312, the evidence shows that he has no claim whatever. He admits himself that he has been paid the amount of the note. No person claims as subrogated to his rights in virtue of the payment.

It is therefore ordered that the judgment of the District Court be avoided and reversed, so far as it relates to the claim of the heirs of Wilcox's wife, and of Clark, Hunt & Philips, as trustees of the New York creditors; and that the tableau be further amended by striking from it the claim of the said heirs, and by reinstating Clark, Hunt & Philips, trustees, as mortgage creditors for the amount due upon the said mortgage, to wit, the sum of \$23,667 31, with interest at seven per cent. from March 27, 1841; and that the tableau in other respects remain as by the judgment of the District Court; and that thus amended it be homologated and approved. The costs to be paid by the mass.

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ANANIAS DUNBAR v. THOMAS BUTLER.

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Desjardin v. Auvray and wife.

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Judgment affirmed.

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jury could not agree. Experts were then appointed, one by the plaintiff, and one by the defendants; they having also disagreed, Joseph Pilié, the umpire appointed by the court, made a report allowing the plaintiff a sum of \$2560 52, for the work done and materials furnished by him in the construction of the house of the defendants. On a rule taken by the plaintiff, this report of the umpire was confirmed and homologated, and judgment entered up in conformity therewith, allowing, however, to the defendants a credit for \$1500, acknowledged to have been received by the plaintiff. The defendants appealed.

They have not undertaken to show, in this tribunal, any cause why the report of the umpire should not have been homologated and made the judgment of the court below, nor do we find any specific ground taken, or objection made to the report itself, in their answer. To the rule taken for its homologation they answer only, that it does not state whether the sum fixed by the umpire is the value of the work done by plaintiff on the building, or whether it is the value of the building at the time the report was made; and they pray that the amount paid by them to one Chappel, whom they employed to finish the work and building, may be deducted from the sum fixed by the umpire. The report presents to our minds no ambiguity. The umpire had before him the reports of the two experts, who had disagreed. He declares that he found the estimate of the one too high, that of the other too low; and proceeding to give an estimate of his own, he fixes \$2560 52, as a fair compensation for such work as had been done by the plaintiff. It is clear that this did not embrace the work which defendants may have caused to be done to finish their house.

Judgment affirmed.

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ARTEMON HILL and another v. The PHOENIX TOW BOAT COMPANY.

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APPEAL from the District Court of the First District, *Buchanan, J.*

This case was argued by *Grima* for the appellants, and by *J. F. Pepin* for the appellees.

MORPHY, J. F. de Lizardi & Co. and L. Millaudon are appellants from a judgment rejecting their claims as privileged and mortgage creditors on the proceeds of the steamers Phoenix, Pilot, Shark, and Semaphore, sold on execution in this suit. In support of their opposition to the tableau of distribution of the proceeds of these boats, filed by the sheriff who made the sale, they have produced two notarial deeds of mortgage, in the ordinary form, executed for advances made and money loaned by them to the defendants. We have held that ships and vessels being moveables, are not susceptible of being mortgaged, except according to the laws and usages of commerce, and that we would recognize the validity of an hypothecation of a vessel only in those cases where it would be recognized by such laws and usages. *Malcolm et al. v. schr. Henrietta and others*, 7 La. 490; *Loze v. Dimitry, et al.*, Ib. 486; *Grant v. Fisk, et al.*, 17 Ib. 158.

Witnesses were produced by F. de Lizardi & Co. to prove that the funds arising from their loan to the defendants, were used for the payment of the most pressing claims against them, such as the wages of the hands and officers, wood bills, &c., and that

the Company could not have got along at all without this loan. From the act of mortgage, these advances appear to have been made, not for the necessities of any particular vessel, but, as the deed itself recites, "in order to facilitate the Phoenix Tow Boat Company in their affairs." The advances were to be made on the notes of the Company to the order of the lenders, duly *paraphed* by the notary, and payable at certain stated periods, and a mortgage on all the steamers belonging to the Company is stipulated to secure the punctual payment of these notes. It is impossible to view this transaction in any other light than that of an ordinary loan of money, to be secured by a mortgage. The funds have very probably been, at least partly, employed in paying debts contracted for the necessities of these boats, and to accomplish the ends for which the Company was created; but this cannot avail the lenders. In *Grant v. Fisk, et al.*, we held that a creditor for advances or loans in money made to the owner, and applied to the use of a vessel, has no privilege allowed him by law, because he is not subrogated to the rights of those whose privileged claims have been paid out of the money loaned. The claim of the appellants comes within none of the cases provided for by article 3204 of the Civil Code, by which privileges are allowed on the price of ships or other vessels. A distinction has been attempted to be drawn between ships trading with foreign ports, and those vessels which, like these steamers, ply only between the mouth of the Mississippi and New Orleans, without ever going out of the State; and it is said that a mortgage of the latter should be held valid. If any such distinction were made, it should, perhaps, be to declare that tow boats, ferry boats, and such other craft as never leave the port to which they belong, remain within the rule of our municipal law, that moveables are not susceptible of mortgage, and do not come within the exception existing under the commercial law, which gives effect to the hypothecation of ships. The reasons on which the exception is founded can hardly be made to apply to vessels of that description. "The object of hypothecation bonds," remarks Chancellor Kent, "is to procure the necessary supplies for ships which happen to be in distress in *foreign* ports, where the master and owners are without credit, and in cases in which, if assistance could not

Whitney and another v. Lyon.

be procured by means of such instruments, the vessels and their cargoes must be left to perish."

As to the claim of the other appellant, Laurent Millaudon, the evidence shows that the mortgage was given, not to secure advances made for the use and necessities of the steamer Phoenix, but to raise money in order to pay a pre-existing debt of the Phoenix Tow Boat Company to John S. Walton. This information we have from the gentleman himself, who, as President of the Company, signed the deed of mortgage.

Judgment affirmed.

SAMUEL WHITNEY and another v. THADDEUS K. LYON.

Case of *Frey v. Hebenstreit*, 1 Robinson, 561, affirmed.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case was submitted without argument.

MARTIN, J. James D. Denegre, the bail of the defendant, is appellant from a judgment discharging the rule which he had obtained against the plaintiffs, to show cause why the bail bond executed by him should not be cancelled, and himself discharged from all responsibility thereunder, the legislature of the State having, since the execution of said bond, passed an act abolishing imprisonment for debt in civil cases, whereby the arrest of the defendant became illegal and the surrender vain.

This case cannot be distinguished from *Frey and another v. Hebenstreit and another*, determined during the last month. 1 Robinson, 561.

It is therefore ordered that the judgment be reversed, and that the rule be made absolute; the appellees paying the costs in both courts.

CHARLES DE BLANC, Syndic, v. JOSEPH MARTIN.

A contract will be deemed to have been made in fraud of creditors, where the obligee knew that the obligor was in insolvent circumstances, and the contract gives to the obligee, if a creditor, any advantage over the other creditors of the obligor. It will not be necessary to establish positive knowledge in the obligee of such insolvency; proof of circumstances tending to produce a strong impression that he was aware of it, will suffice.

APPEAL from the District Court for the parish of Assumption, *Nicholls, J.*

Miles Taylor, for the plaintiff.

Ilsley and Nicholls, for the appellant.

BULLARD, J. The syndic of the creditors of Jean Materre instituted the present action to annul a sale made by the insolvent to his father-in-law, the defendant, of the merchandize and fixtures in his store in the parish of Assumption, of all the moveables and furniture then in the house, the horses, cows, oxen, carriages, carts, tools, and every thing which constituted his establishment in said parish, together with all the debts and notes then due, or to fall due, growing out of the business of said store, and the use, for five years, of the property on which the store was established. It is alleged that this sale was fraudulent as to the creditors of the vendor, having been made when he was in failing circumstances, to the knowledge of the defendant, within three months of his declared insolvency, and with a view to give an unjust preference to some of his creditors over others.

There was a judgment annulling the contract, and the defendant has appealed.

The insolvency of Materre at the time of the contract is proved to our satisfaction. The amount of his debts at that period is shown to have greatly exceeded his means.

It is equally clear that Martin was a creditor of the vendor, at least for \$2400, and part of the price is stated in the sale to have been due to the purchaser for an amount previously loaned. The form of the act is unusual, if not suspicious. It is in the nature of a sale *omnium bonorum*. It purports to convey in a lump the merchandize, furniture, stock of horses, cattle, &c., farming utensils, notes, and book accounts, due or not due, without any specification or detail, of which, however, it is stated that a general

inventory *had been exhibited*; but no such inventory is annexed to the act of sale, nor otherwise referred to. It is impossible from the act itself to ascertain what was sold, much less its real value. The consideration is stated to have been \$20,000; of which, \$3700 had been paid to the Louisiana State Bank, \$1500 to the son of the purchaser, \$3600 to Clement for his salary, \$800 to Mad. Breaud, besides the borrowed money, and the balance was to be paid in four equal annual instalments.

The insolvency being apparent, and it having been admitted by the contract itself that the purchaser was a creditor of the vendor, the Code is positive "that every contract shall be deemed to have been made in fraud of creditors, when the *obligee knew that the obligor was in insolvent circumstances*, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." Art. 1979. The only question, therefore, which remains is, whether Martin knew of the insolvent circumstances of Materre. This was solved by the District Court in the affirmative. It is impossible to bring home very positive knowledge on such a subject. There are circumstances which tend to create a strong impression that Martin was not ignorant of the failing circumstances of his son-in-law. About five months previous to the sale in question, he had required from him a mortgage to secure him against certain endorsements and an *avance-ment d'hoirie*—that is to say, as we presume, a sum received on account of his wife, from her father. The amount secured was about \$21,000, and the property mortgaged was nearly all, (except what formed the object of this sale,) that Materre possessed. He must have known also of the obligations of his son-in-law to the State Bank, because this sale makes provision for \$3700 paid to that bank, as well as for \$1500 borrowed by his son of Abat to pay for Materre. Upon this question of fact we see no sufficient reason to differ from the court below, which was satisfied, from all the circumstances of the case, that the defendant knew of the failing circumstances of his vendor. It becomes, therefore, useless to examine other questions raised in the argument of the case. Being satisfied that Martin was a creditor, that he knew of the discomfiture of Materre, and that he obtained an advantage by the contract to the prejudice of the other creditors, the contract is liable to be avoided. The case is different from that of *Maurin*

Kittridge v. Breaud.

§ *Co. v. Rouquer et al.*, 19 La. 594. It did not appear in that case that the son was a creditor of his father, much less that he knew of his insolvency, and the price really paid was a fair one.

Having concluded that this contract ought to be annulled, so far as it affects the creditors of Materre, the court below found it difficult to render such a judgment as should place the parties in the condition they were in before the sale. This difficulty arose from the vagueness of the contract, and the want of *data* as to the goods or notes and book accounts which Martin should restore on the cancelling of the contract. The judgment, therefore, permits Martin to retain what he purchased, on his paying to the syndic the price of the property, reserving to him his right to come in as a creditor for such sums as he may show were really due to him for payments made on account of the purchase. This appears to us equitable and just.

Judgment affirmed.

EBENEZER EATON KITTRIDGE v. GODFROI BREAUD.

Under the seventh sect. of the act of Congress of 11th May, 1820, reviving sect. 5 of the act of 3d March, 1811, authorizing the owner of any tract of land bordering on a water course in the territory of Orleans, to purchase, by preference, any vacant land in the rear of, and adjacent to his tract, not exceeding a certain quantity, plaintiff, whose front tract had not then been surveyed, purchased, a few days before the expiration of the act, the quantity of land which he supposed himself entitled to claim. The seventh sect. of the act of 1820, having been revived and continued in force for eighteen months, by sect. 1 of the act of 28th of Feb., 1823, and plaintiff, having within that time discovered that he had not entered as much land as he was entitled to, applied for, and purchased the additional quantity, a survey of which, by a surveyor of the United States, approved by the principal deputy surveyor in the district, was deposited in the Surveyor General's office. When the public lands were surveyed, long after plaintiff's purchases, the surveyors marked the first purchase on the township plats, but omitted the second, so that the land embraced by it appeared to be public; in consequence of this omission, defendant, a settler on the public lands, purchased a portion of the land included in plaintiff's second purchase, under the act of 19th June, 1834, granting pre-emption rights. *Held*, that having omitted, through error, to purchase, at first, the whole quantity of land to which he was entitled, and having availed himself of the discovery of his error, in a short time afterwards, and before any one had taken advantage of it, or

acquired any right to the land, plaintiff was entitled to purchase the additional quantity; and that the operations of the surveyors should not be allowed to take from, nor add to the rights and claims of individuals, when recognized by the proper officers of the United States.

Arts. 2242 and 2417 of the Civil Code, which provide that a sale of immoveable property shall have effect against third persons, only from the day when it was registered in the office of a notary, and the actual delivery of the thing took place, do not apply to titles derived from the United States, which has offices of its own for the disposition of its domain, and for the preservation of the records of whatever is done in relation thereto.

APPEAL from the District Court of Assumption, *Deblieux, J.*

GARLAND, J. The plaintiff alleges that André Le Blanc, his vendor, being the owner of a front tract of land on the bayou Lafourche, having five *arpens* front, by forty in depth, did, on the 8th of May, 1822, and the 28th of August, 1824, enter at the Land Office in New Orleans a quantity of land equal to his front tract, under the acts of Congress of the 11th of May, 1820, and the 28th of February, 1823, which authorized front proprietors in this State to enter, at the *minimum* price, a quantity equal to that contained in their front tracts. These entries, he alleges, were legally surveyed and located, by the proper officers. He avers that the defendant has illegally taken possession of $71\frac{4}{8}$ acres, comprised within the entry of $91\frac{5}{8}$ acres, made on the 28th of August, 1824, and that he asserts title to the same. The commission of various trespasses and acts of waste is stated, and a judgment for the land, and \$2000 damages, is prayed for.

The defendant alleges that he is the owner of a tract of land of 114 acres, more or less, which he purchased from the United States, at the Land Office in New Orleans, on the 5th of May, 1835, which he has ever since owned and possessed. He further declares, that he has made improvements on said land, to the value of \$3000, in good faith, believing himself to be the owner and rightful possessor. He asks to be quieted in his title and possession; but in the event of eviction, prays to be paid for his improvements and expenses.

On the 3d of March, 1811, Congress passed an act, the fifth section of which authorized every owner of a tract of land in Louisiana, fronting on a water course, to purchase an equal quantity of vacant land in the rear of, and adjacent to, the front tract;

which privilege continued to exist for three years. 1 Land Laws, 588, sec. 5. On the 11th of May, 1820, this section of the act of 1811 was revived for the term of two years. Ibid. 779, sec. 7. Under this act, André Le Blanc, on the 5th of May, 1822, became the purchaser of 200 acres, at the Land Office in New Orleans, situated in the rear of his front tract. It does not appear that this tract was surveyed or located until April 9th, 1829. On the 28th of February, 1823, Congress passed an act reviving and continuing in full force and effect, for the term of eighteen months, the 7th section of the act of May 11th, 1820. Ibid. 835, sec. 1. On the 15th of May, 1823, Le Blanc requested Bonnet, a surveyor of the United States, to survey for him a further quantity of 91, $\frac{3}{10}$ acres, which he claimed as a pre-emption under the last acts of Congress, being in the rear of his front tract. This survey was approved by J. Wilson, Principal Deputy Surveyor in the Land District.

On the 19th of March, 1824, André Le Blanc addressed a letter to the Principal Deputy Surveyor of the South Eastern Land District, requesting him to have surveyed such vacant land as might be found applicable to his pre-emption right, adjacent to, and in the rear of his tract of five *arpens* front on the Lafourche, which he says is 91, $\frac{3}{10}$ acres, being the completion of his back concession, purchased under the act of Congress of May 11th, 1820. What was done in consequence of this application, does not appear, but on the 28th of August, 1824, Le Blanc applied to the Register of the Land Office in New Orleans, to purchase this 91, $\frac{3}{10}$ acres, as being necessary to complete the quantity contained in his front tract, which privilege was accorded him, and he paid for the same, and took out a regular certificate of purchase. No further survey or location of this land was made until May 20th, 1836, when a regular survey was made, and approved by the Surveyor General on the 4th of May, 1837. The front tract and the back lands, are now vested in the plaintiff.

When the aforesaid entries were made, the public lands in that section of country were not surveyed, nor were many of the private claims finally located and measured. The plaintiff says that Le Blanc's front tract of five *arpens* front, in consequence of the opening of the lines, contained more than two hundred superficial

arpens, which fact was not known when the first entry was made, but was ascertained afterwards, and that the second entry or purchase of 91,⁶³/₁₀₀ acres was allowed and made, for the purpose of making up the quantity to which he (Le Blanc) was legally entitled. The plat shows that the lines open very considerably, and it is certain that the front tract contained more than two hundred acres, and it is probable that this was the reason of permitting the second entry.

When the public lands were surveyed, long after Le Blanc's purchases, the United States' Surveyors only represented the first one on the township plats, although the survey of Bonnet was in the Surveyor General's office, in consequence of which, the 91,⁶³/₁₀₀ acres appeared to be public land, and the defendant on the 5th of May, 1835, purchased 71,⁴³/₁₀₀ acres of it, with other land adjoining, as a pre-emption right, under the act of Congress of the 19th of June, 1834, granting that privilege to settlers on the public domain, and a certificate was given to him in conformity to law.

On the trial, in addition to the foregoing facts, it appeared that the defendant settled on the land about the year 1830, not setting up any title to it then, nor does it appear that he ever was disturbed by Le Blanc; but there was an old boundary post standing, which included the land possessed by the defendant within the claim of the plaintiff. But there is no evidence to show that any complaint was ever made by Le Blanc or the defendant, of any interference between their rights, until the plaintiff purchased.

The District Court, in conformity with the verdict of a jury,* gave a judgment in favor of the defendant, from which the plaintiff has appealed.

Connely, for the appellant.

Miles Taylor, for the appellee. Plaintiff's vendor was not entitled to any right of pre-emption by the act of 1823. 1 Land Laws, 588, 777, 835. No legal entry had been made by him, nor had the title of the United States been divested. *Ib.* 456, 457, 458, 460, 461, 570, 588, § 4, and 586. 2 *Ib.* 295. Civ. Code, arts. 2451, 2453,

* This was the second jury that had found a verdict in favor of the defendant.—
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2456. *Jourdan v. Barrett*, 13 La. 24. The laws of the United States in relation to the public lands, only determine when, and how they are to be sold, leaving the rights of individuals under them to those of the state in which they are situated. *Wilcox v. Jackson*, 13 Peters, 557. Civ. Code, arts. 9, 10.

GARLAND, J. The defendant contends that André Le Blanc was not entitled to any right of pre-emption under the act of February, 1823, and that he was improperly allowed to purchase the 91,000 acres of land surveyed for him in 1836, as he had availed himself of the act of May 11th, 1820, and that, not having purchased the full quantity to which he was entitled, he must be presumed to have abandoned his right to enter more than the two hundred acres, as soon as the act expired; and that no errors could then be rectified, as the privilege itself had expired. To this the plaintiff replies, that Le Blanc had a right to enter as much land in the rear as he had in his front tract; and as no survey had been made, an error was produced in the first purchase, which should not prejudice his rights. He further says, that the act of February 28th, 1823, was a revival and continuation of the act of May 11th, 1820, and both are to be considered as one law, and the right of Le Blanc goes back to the latter date, and that having acquired a title by paying the price of the land, no subsequent action of the government or neglect of its officers can divest him of it.

Upon this point we are disposed to coincide with the plaintiff. We think it is sufficiently shown by the first purchase, that Le Blanc looked more to the front and depth of his land to ascertain the superficial quantity, than he did to the direction of his side lines. His purchase was made only three days before the expiration of the act of May 11th, 1820, when very little time remained to correct any errors; and we find him very soon after the act of February 28th, 1823, was known, taking the necessary measures to ascertain the quantity of land he had omitted to enter in the first instance, and finally purchasing it, before any one had availed themselves of his error, or obtained any rights upon it. Le Blanc had done all in his power to secure the land for himself, which he unquestionably had a right to enter originally. He had had a survey made of the land included in his second purchase, which was returned to and approved by the Principal Deputy Surveyor of

the district, and remained in his office until the office of Surveyor General was created, where it is still on file. The Register and Receiver of Public Moneys had the evidence of his right; and there never would have been any difficulty about his title, had the United States surveyors and officers performed their duties properly, and represented both purchases upon the township plat, as should have been done, instead of making one of them appear as public land. In 6 Mart. N. S. 216, 217, this court said, "the operations of surveyors ought not to be allowed to derogate from or add to the rights and claims of individuals to land, when recognized by the proper officers of the United States." Their action cannot, therefore, impair the right of the plaintiff.

The defendant's counsel contends that no legal entry of the land was ever made by André Le Blanc, and the title of the United States was never vested in him, as there was no delivery of the property. To this proposition we cannot yield our assent. The survey made by Bonnet in 1823, and approved by the Principal Deputy Surveyor of the district, specifies the metes and bounds. The land seems to have been purchased in conformity with it, and the delivery and putting in possession was therefore as perfect as in any other purchase from the United States.

On the defendant's third point it is sufficient to remark, that the land seems to have been sold to Le Blanc in conformity to law, there not being at the time any adverse claim or right. What effect might have been produced, if, in the interim between May the 8th, 1822, and the 28th of August, 1824, the defendant had settled upon and acquired any right to the land in controversy, it is unnecessary to determine, as no such right is pretended to exist. The defendant never was on the land until six years after Le Blanc's purchase, and had neither an equitable nor legal claim for near ten years, admitting it to have continued to be the property of the United States.

The last ground taken by the defendant's counsel is, that his client purchased in good faith, without actual or constructive notice of the existence of Le Blanc's claim, and that he ought to be protected in the enjoyment of the land. To sustain this view, the counsel relies upon the articles 2242 and 2417 of the Civil Code, which provide, that all sales of immoveable property, to

have effect against third persons, must be recorded in the parish where the property is situated. We are of opinion that titles derived from the United States do not stand precisely in the same category with sales made by individuals or ordinary corporations. That government has offices for the purpose of disposing of its domain, and they contain the public records of all that is done in relation to its disposition. All sales are recorded, or should be recorded, in those offices, and there the necessary information can be obtained in relation to any piece of land that a party may wish to purchase. It is shown, in this instance, that if the defendant had used due diligence, he might have ascertained the purchase of André Le Blanc, as the evidence was in the Surveyor General's office, and on the books of both the Register of the Land Office and of the Receiver of Public Moneys in New Orleans; and the error which has produced the whole difficulty, rests with the surveying department in not representing this land as sold, when it in fact had been so disposed of. Had this appeared on the township maps, the defendant never could have purchased. That this was unintentional, is evident from the fact, that in 1837, nearly two years after defendant's purchase, the Surveyor General caused the whole claim of Le Blanc to be located and surveyed according to his purchases, and approved the same.

With these views of the case, we are of opinion the court and jury erred in giving a verdict and judgment for the defendant; but as the whole case is not before us in such a shape as to enable us to do justice to all parties, we shall remand it for a new trial.

The judgment of the District Court is therefore reversed, the verdict of the jury set aside, and the cause remanded for a new trial, with directions to the judge to conform in the trial thereof to the principles herein expressed, and otherwise to proceed according to law; the appellee paying the costs of this appeal.

JAMES CASSIDY v. His CREDITORS.

Fraud will not be presumed. He who alleges it, must establish it clearly.

A mortgagee who seeks to enforce his mortgage against third persons, must prove that it has been duly recorded.

An order of seizure and sale obtained against a third person, will be set aside, where the mortgage was not proved to have been recorded.

APPEAL from the District Court of the First District, *Buchanan, J.*

Grirot, for the syndic.

Greiner, for the appellant.

BULLARD, J. Moffat opposed the homologation of the provisional tableau of distribution of the funds of the estate of the insolvent, on the ground that he was not placed thereon as a mortgage or privilege creditor on the slave Richard, or on the proceeds of the sale of the said slave, he being the holder of the note given by the insolvent, and as such subrogated to the mortgage given to secure the price of that note, and on other grounds.

The syndic denied all the allegations of the opponent, and averred that he was not the *bona fide* holder of the note. The opposition was rejected, and the opponent has appealed after an unsuccessful attempt to obtain a new trial. Our attention has been called by the appellant's counsel to his bill of exceptions to the admission of Conway as a witness, on the ground that he is a creditor of the insolvent as appears from the schedule, and is interested in the defeat of the claim of any other creditor, as the funds out of which he is to be paid will be thereby increased. The objection was overruled, the court being of opinion that the witness, not having been placed on the provisional tableau as an ordinary creditor, and having suffered the legal time to elapse since the syndic's publication without opposing it, was now precluded from claiming a place thereon as a creditor, and therefore without interest.

An examination of the case on the merits, has relieved us from the necessity of testing the correctness of the judge's opinion as to this bill of exceptions, as the rejection of the testimony of

Conway would not lead to a result different from that of its admission. Mr. Cook, a witness against whom there is no objection, testifies that he purchased the note from Belleau before its maturity, as agent for the appellant, who employed him for that purpose, and furnished him with the money. Conway, the only witness of the appellee, deposes that Cook and the insolvent bought the note from Belleau, who was often at Cassidy's on business relating to this note; and that there were many conversations between them respecting it. On his cross-examination this witness declared that he was not certain who bought the note, but thinks that the money was paid by Cook; he does not know with whose money; he heard them say that they bought the note for \$750. On this testimony we are unable to arrive at the same conclusion as the judge *a quo*. The parties were at issue on an allegation of fraud. Fraud is not to be presumed, and he who alleges it must establish it clearly. The appellant is in possession of the note; he proves his purchase, and the payment of the price by the person whom he employed to buy the note. The contract is proved by one witness, and the possession of the note is a strong corroborating circumstance. The appellant was therefore entitled to judgment, unless his adversary established the fraud. This was attempted by the testimony of Conway, who tells us that Cook and Cassidy purchased the note; but on his cross-examination he declares that he is not certain who bought the note, but thinks that the money was paid by Cook. So far, his cross-examination weakens, if it does not totally destroy the effect of his testimony in chief, and strengthens that of the appellant's witness. He speaks of several conversations between Belleau and the insolvent in regard to the note, and if any thing in the testimony of this witness assists the appellee, it is his declaration that he heard the insolvent and Cook say that they had bought the note for \$750. The testimony of Cook is uncontradicted. No suspicion has been cast on him, and what has fallen from him greatly preponderates over that portion of Conway's testimony from which the appellee may receive some aid. It is contended that the note was extinguished by the payment of it by the drawer; but this is inconsistent with the testimony of Cook, and with part of that of Conway, and the idea is repelled

by the consent of Belleau to part with the note without erasing his endorsement or writing a receipt over it, and by his endeavoring to obtain a release, which would have been useless had the note been paid by or for the drawer. He was sensible that his liability as endorser remained in full force, which could only be in favor of a purchaser and endorsee.

It has lastly been contended by the counsel for the appellee, that there is no proof of the existence of the mortgage, and that the presumption is that the insolvent had erased it.

The existence of the mortgage appears in an authentic act of sale which is part of the record. The erasing of a mortgage is a matter of such easy proof, that he who alleges it cannot expect to succeed on so weak a presumption as that which is here offered, and rebutted by the production of the note.

But "conventional or judicial mortgages are only allowed to prejudice third persons, when they have been publicly inscribed on records kept for that purpose." Civ. Code, art. 3314. "It shall be the duty of notaries, and other public officers acting as such to cause to be recorded without delay all acts creating mortgages, which shall be executed by them, whether such mortgages be conventional or legal." Art. 3334. In the last edition of the Code of Louisiana, the editors have referred us on this article to an act of 1834, page 168. We have looked in vain at that page, and in the acts of that session, for any thing relating to this article of the Code. We suppose the reference was intended to have been to the acts of 1838, p. 17, which relates to registries in the office of the Register of Conveyances. Notwithstanding the obligation under which the notaries are placed, to cause to be recorded all mortgages executed by them without delay, the mortgagee who seeks to enforce his mortgage against a third possessor is bound to prove that it was duly recorded. In the case of *Sinnot v. Mitchell*, 7 Mart. N. S. 578, we held that "an order of seizure and sale cannot issue on property in the hands of a third person, unless on the production of an act of mortgage *duly recorded*." And in the case of *Brou v. Kohn*, 12 La. 104, we set aside an order of seizure and sale which had been obtained against a third possessor, on a judicial mortgage which was neither alleged nor

Lyons, for the use of, &c. v. Kenner.

proved to have been recorded. As the appellant has neither alleged nor proved that the act from which the mortgage, which he seeks to enforce results, was recorded, the inferior judge did not err in refusing him a place on the tableau of distribution as a mortgage creditor.

But justice requires that the case should be sent back to enable him to make good his opposition on other grounds.

The judgment is therefore reversed ; and it is ordered that the case be remanded for further proceedings according to law, the costs of the appeal to be paid by the appellee.

JAMES LYONS, for the use of the Farmers' Bank of Virginia
v. MINOR KENNER.

Where, after a protracted illness, a disease, which existed at the time of the sale, assumes a new and different character, and finally causes the death of a slave, there may be reason to doubt the vendee's right to recover in a redhibitory action. *Aliter*, where the evidence proves that the death was the consequence of the original disease.

Defendant having purchased a lot of negroes, in other respects sound, on placing them in the railway cars to be transported to his plantation, a distance of sixteen miles, discovered in one of them the first symptoms of the measles. The one thus affected was not separated from the rest, either in the cars or on his plantation, and no physician was sent for until four days had elapsed, when another was found ill of the same disease. Both of these, and two others, died of the disease. In an action by the vendor for the price : *Held*, that the measles is not an incurable malady ; that defendant, by neglecting to separate the sick girl from the other slaves after notice of the disease, and by omitting to call in medical aid at once, failed to act as a man of ordinary prudence would have done ; and that the presumption created by sect. 3 of the act of 2 January, 1834, as to slaves who have been less than eight months in the state, that any redhibitory malady which displays itself within fifteen days after the sale, existed on the day thereof, does not apply to such a case.

To recover in a redhibitory action, a purchaser must show that he acted with, at least, ordinary care and attention, and that no act or omission of his can have occasioned the loss he attempts to throw upon his vendor.

APPEAL from the District Court of the First District, *Buchanan*, J.

I. W. Smith, for the plaintiff, cited *St. Romes v. Pore*, 10

Lyons, for the use of, &c. v. Kenner.

Mart. 30. *Serapurn v. Bousquet*, 15 La. 509. *Price v. Barr*, 6 Littell Rep. 216. *Wheeler on Slavery*, 127.

No counsel appeared for the appellant.

MORPHY, J. This suit is brought on a promissory note of \$7933 33 $\frac{1}{2}$. The defendant admits his signature, but avers that the note was given in part payment for certain negroes lately introduced into the state, which negroes were sold to him under a full warranty against all redhibitory vices and maladies; that at the time of the sale, a number of said slaves were affected with an incurable disease called the measles, of which several died, to wit, *Isaac, Preston, Martha Ann, and Reuben Cooper*, although every care and attention which medical skill could render, was bestowed on them; that these four slaves were together of the value of \$1900, and that expenses were incurred for medical attendance on these and the other negroes diseased, to the amount of \$500. The defendant further avers, that at the time he purchased these slaves and carried them to his plantation, he had thereon a number of other slaves; that the disease, with which the slaves bought of plaintiff were afflicted, being of a contagious nature, many of his other negroes caught the infection; that some died and others were sick for a length of time, and that by the loss of negroes, the trouble, and expense, and the loss of labor during their illness, he has suffered damages to the amount of \$3000. The answer concludes with a reconventional demand for the sum of \$5400.

The judge of the Inferior Court was of opinion that the slaves did not die of the measles, but of other diseases not alleged to have existed at the time of the sale. We cannot consider as diseases distinct and different from the measles, the affections of the lungs, bowels, brain, &c., which in the opinion of the physician who attended on these slaves, were occasioned by that malady, and in consequence of which they died. The judge says that by describing these morbid affections as the consequences of the measles, the witness shows them to have been something distinct from the measles itself. It appears to us more reasonable to infer from his expressions, that the complaints which caused the death of these four slaves, were effects, or rather modifications of the disease called the measles, which in its progress is known to set-

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tle on various parts of the system. If after a protracted illness, a disease existing at the time of the sale, should assume a new and different character, and finally cause the death of a slave, there would be reason to doubt a purchaser's right to recover, because the proximate and not the remote cause of the death is perhaps to be considered; but in this case the physician declares positively that these slaves died in consequence of the measles—two of them within a fortnight after being taken sick, and the other two about six weeks afterwards. We have come, however, to the same conclusion as the court *a qua*, but upon another ground. The testimony shows, that the slaves sold to the defendant appeared, before and at the time of the sale, to be sound, healthy, and free from any disease. They had been found so by defendant's own physician, who visited them, although not, as he says, with the view of examining whether they were sound or not. On the day after the sale, when, at the defendant's request, they were taken to the *depôt* of the Carrolton Rail Road to be transported to his plantation, one of the lot, a young girl named Martha Ann, complained of pain in her head and back, and had some fever, and a running from the eyes, which are described by the physicians as the first symptoms of the measles. Of this, a witness who had charge of the negroes informed the defendant, who nevertheless had her sent up in the cars, together with the other negroes, a distance of several miles. It has not been shown that on reaching the plantation, she was kept apart from the other negroes; and a physician was only called in to see her four days afterwards. If, during this time, the sick girl associated with the negroes, as seems to have been the case, it would have been a matter of surprise, had the disease, which is said to be of the most contagious nature, not spread among them. When the physician was called in, he found the girl, Martha Ann, and the negro, Isaac, sick with the measles, and he tells us that a great number of the other negroes caught the disease within fifteen days after the sale. The defendant invokes the presumption, created by section 3 of the statute of 1834, as to slaves recently introduced into the state, that if any redhibitory maladies, bodily or mental, display themselves within fifteen days after the sale, they shall be presumed to have existed on the day thereof. This

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presumption appears to us to have been considerably weakened, if not entirely destroyed, by the circumstances of this case. Had the defendant shown, that upon being warned of the appearance of the disease in the girl Martha Ann, he had taken the precaution of immediately separating her from the other slaves, he might have entitled himself to the benefit of the presumption he calls to his aid; but not having made any such proof, and the plaintiff having shown that the slaves were sound and healthy at the time of the sale, we do not think that he can avail himself of it. From the testimony, the measles cannot be considered as an incurable malady. One of the physicians describes it as a very manageable disease, which may be easily cured if promptly attended to, unless connected with some other malady, or unless some imprudence be committed by exposure or diet. The prompt and fatal termination of the disease may be owing to some of the latter causes. It appears to us that after the warning he had received, the defendant did not act as a man of ordinary prudence would have done. Had he separated Martha Ann from the other negroes, and procured medical aid for her immediately, she might have recovered, and none of the other slaves have caught the disease. A purchaser, in order to recover in a redhibitory action, must show that he acted with, at least, ordinary care and attention, and that no act or omission on his part can have occasioned the loss which he attempts to throw upon the seller, especially when, as in the present case, the slaves sold are proved to have been apparently sound at the time of the sale, and a rigorous presumption of law is resorted to, to show that they were unsound at that time.

Judgment affirmed.

ISAAC BALDWIN v. HENRY CARLETON.

Where the accounts of an executor have been homologated, he can no longer be held responsible for payments made by him under the orders of the Court of Probates. Should the heir discover that payments have been made which were not due, his recourse, if he have any, is by an action *condictio indebiti*, against the party who has received what he was not entitled to; and where such payments have been made to the executor for commissions alleged to have been illegally allowed, an action to recover them may be brought against him, individually, before a court of ordinary jurisdiction. The defendant is no longer executor, nor is he sued as such.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
MORPHY, J. This suit is brought to recover \$3593 60 for an amount of commissions illegally charged and received by the defendant as one of the executors of the last will of the late Eliza Baldwin, the plaintiff's mother. The petition avers that the defendant and Thomas H. Maddux, his co-executor, administered on the estate of the deceased, and had an inventory made, in which was included all the property in which she was interested, and that nearly the whole of the property so inventoried belonged to the said Eliza Baldwin and to the plaintiff, having been previously the property of the late Isaac Baldwin, the plaintiff's father, who died in April, 1833; that the said Thomas H. Maddux and H. Carleton, on the 27th of February, 1837, rendered an account of their administration, in which they credited themselves with two and a half per cent commissions as executors, on the whole amount of the inventory made after the death of Eliza Baldwin, which inventory embraced a large amount of property not belonging to her estate; and that thus the charge for commissions amounted to \$14,374 38, whereas they were entitled only to one half of that sum, to wit, \$7187 19, and that the said Carleton, in particular, was entitled only to \$3593 60. It also avers that the said account was homologated, and that the said sum of \$14,374 38 was received by the said Maddux and Carleton.

The petition further shows that the petitioner having since attained the age of majority, made a settlement with Thomas H. Maddux, who had also been his tutor; that he then ascertained

that the said commissions had been overpaid, and that as soon as Maddux was informed of the mistake under which he had received said double commissions, he refunded them to the plaintiff, but that the said Carleton, although amicably requested, has refused to refund the said sum of \$3,593 60. The defendant pleaded the exception of *res judicata*, averring that the commissions for which this suit is brought, have been properly allowed in a court of competent jurisdiction, to wit, the Court of Probates of the parish of Orleans, in proceedings to which the legal representative of the plaintiff was a party, and by a judgment which was confirmed by the Supreme Court of the State. He made also a reconventional demand for professional services rendered to the late Eliza Baldwin. On the trial, the defendant filed a plea, "that by reason of the nature of the demand, the parish court was without jurisdiction over the same." On this plea, the suit was dismissed for want of jurisdiction; and the plaintiff has appealed.

Janin, for the appellant. The petition shows that an illegal commission was charged by the executors of Baldwin in their account presented to the Court of Probates; that the account was homologated, and the amount received by them. For the reimbursement of his share of this sum, the defendant is now sued. The petition is silent as to whether the homologation be binding on the plaintiff or not. The defendant alleges that it is. If this be so, the executors were justified in paying the amount, and cannot be made responsible therefor. If any recourse be left, it must be against the pretended creditor; and the only question between the plaintiff and defendant must be under the plea of *res judicata*, in support of which the defendant must show that the homologation was so made as to bind the plaintiff.

The exception to the jurisdiction of the court is unfounded. The action is not against the defendant as executor, but as the individual who received the money, and he is as distinct from the executor as any other person unconnected with the administration of the estate, to whom the amount sued for might have been paid.

If the decree of homologation be not binding on the plaintiff, he may proceed against the executors, and compel them to refund what they have illegally paid. They would have recourse against the pretended creditor, whom the homologation would no more

protect than it did the executors. The plaintiff has a direct action against the creditor, who has been improperly paid. He cannot be compelled to resort to the circuitous remedy of suing both the executors and the creditor. The lower court considered the claim of the plaintiff as one against the executors. This opinion could not have been derived from the petition, which states expressly that the defendant is sued as an individual. Was it drawn from the alleged homologation of the accounts of the executor? If this homologation did not protect the executor, the plaintiff has a cumulative remedy; if it did protect him, the petitioner could have proceeded only against the individual who received the illegal payment.

Micou, for the defendant.

MORPHY, J. In considering an exception of this kind, the facts set forth in the pleadings must be taken as true. If, as appears from the petition and answer, the accounts of the executors have been rendered and homologated, and the commissions paid to them, we can see no good reason why the parish court should be without jurisdiction in the premises. Where there has been an homologation of the account of the executors, they can no longer be made responsible for the payments they have made as such under an order of the Court of Probates. If the heir discovers that sums have been paid which were not due, his recourse, if any he has, must be by an action *condictio indebiti* against the creditors whom the executors have paid through error. In this instance, the creditor who is alleged to have received what was not due to him, happens to be one of the executors. We cannot see that this circumstance should place him on a different footing from other creditors, who may have received through mistake a larger sum than they were entitled to, or sums to which they had no right whatever. The defendant is no longer executor, nor is he sued as such. He detains this money as his private property, and is suable for it in the courts of ordinary jurisdiction; but whether the decree of homologation is binding on the plaintiff, so as to support the plea of *res judicata*, or not, is quite a different question, and one not at present before us.

It is therefore ordered that the judgment of the parish court be reversed; and that this case be remanded to be proceeded in ac-

according to law, the defendant and appellee paying the costs of this appeal.*

**Micou*, for a re-hearing. No court can render a definitive judgment in this suit without deciding whether the inventory was correct or incorrect, and the charge of commissions legal or illegal. Can a court of ordinary jurisdiction pass upon either the one or the other? If the administration were incomplete, would the parish court have jurisdiction to decide whether the inventory was correct, and what amount of commissions should be allowed to an executor? Certainly not. A suit, to decide such questions, instituted before a court of ordinary jurisdiction, must be dismissed, and the parties referred to the tribunal specially and exclusively authorized to decide such matters. Code Prac. art. 924.

The Court of Probates, to which this exclusive jurisdiction is given, has already decided. An inventory has been filed and approved; an account has been rendered and homologated. The parish court had no jurisdiction before the homologation. How can it acquire such jurisdiction afterwards?

The court *a qua* says that the plea of *res judicata* is not now before it. The case, as presented by the plaintiff, is in such a form to render this plea, or any other, wholly superfluous. The question of *res judicata* arises on the face of the petition. The plaintiff avers that the money reclaimed by him was paid in pursuance of a judgment. Had he simply alleged that it had been illegally received, it would have been for the defendant to *plead* a judgment, if any existed. But when the plaintiff himself informs the court of the existence of a judgment, what necessity is there for the defendant to repeat the allegation in a plea?

Such a plea would be a mere suggestion. One not engaged in the suit, might, as *amicus curiæ*, make the same suggestion, and the court would consider it. On reading the petition, where the nature of the demand is brought to the attention of the court, it is the first duty of the judge to decide whether the subject is one over which the laws have given him jurisdiction. Code Prac. art. 88. If at any time before a final decree he perceives that the subject is not within his jurisdiction, the suit must be dismissed. Should he have erroneously given a judgment in such a case, it would be void. Even consent cannot give jurisdiction over cases which, *ratione materiæ*, are not within the competency of the judge. The judge is *prohibited* from entertaining the case even on the request of both parties. Code Prac. art. 92. The first element in the validity of a judgment is the competency of the court which renders it; if the court is incompetent, the judgment is absolutely void, and has no more effect than if it had never been pronounced.

The court *a qua* decided that it could not approve or disapprove the inventory of an estate administered in the Probate Court, nor regulate the amount of commissions due to an executor; and that it had no authority to reverse the decrees of the Probate Court as to the correctness of such inventory, or the amount of such commissions. Will this court remand the case, with instructions to do either the one or the other, or to obtain proof of the existence of a judgment which is alleged by the plaintiff and admitted by the defendant?

This is not an action to annul the judgment of the Court of Probates. The plaintiff, it is true, says that he was a minor at the date of the judgment, but he does not

allege that he was not legally represented in the proceedings, nor does he pray that the judgment be annulled. But if it were such an action, it would still be within the exclusive jurisdiction of the Court of Probates. Code Prac. art 608, 618. *Harty v. Harty*, 8 Mart. N. S. 520. *Lewis' heirs v. Lewis' executors*, 5 La. 393.

The object of this suit is to recover the money, *notwithstanding* the judgment under which it was paid. This cannot be done. The object of a judgment is to settle the rights of the parties. When a court has once decided, its decree is the law between the parties as to every thing embraced in the judgment. If money has been paid in conformity with a judgment, it cannot be recovered by suit until the judgment has been annulled, or reversed on appeal. Neither the court in which it was rendered, nor any other court, can inquire whether the judgment was correct, nor can they disregard it, and again decide on the same issue. A controversy, settled by a final judgment, cannot be revived. Code Prac. 539, 548.

The case of *Martin v. Martin*, 5 Mart. N. S. 171, was somewhat similar to the present. During the minority of the plaintiff, a partition of property in which he was interested, was made by sale. The curator of the minor purchased, on his account, a part of the property, and the partition and purchase were confirmed by a judgment of the proper court. The plaintiff, arriving at his majority, sued the heirs of his curator, disclaiming the purchases, alleging that they were contrary to law, and demanding in money the amount invested in the property.

The court says: "If that prayer was acceded to, these proceedings, in relation to the rights of the minor, would present very singular features. There would be a judgment of a court of competent jurisdiction, deciding that he was the owner of the property. There would be another, which, leaving that judgment unreversed, would declare that he is entitled to the price of it. Now this cannot be, and unless we shall find, on further inquiry, that the first judgment is *absolutely, not relatively, null and void*, we are perfectly clear the plaintiff cannot recover in this action."

And again in the case of *Broussard v. Bernard*, 7 La. 223, the court, Bullard, J say, "this court has held that a judgment, rendered by a court of competent jurisdiction, between parties legally before it, cannot be questioned indirectly and collaterally; and, in a recent case, that minors properly represented, are equally bound."

The question before the court is not whether the ordinary tribunals can entertain suits to recover money illegally paid by an executor. The true questions presented by the petition itself are, can a court of ordinary jurisdiction inquire into the correctness of an inventory? Can it fix the amount of an executor's commissions? Can it revise or reverse the judgment of the Probate Court?

Surely to ask these questions, is to ensure an answer fatal to the plaintiff's demand. His demand cannot be granted, nay, it cannot be heard, without a subversion of fundamental principles of the law, and a flagrant disregard of a reasonable, settled, and necessary system of adjudications.

Re-hearing refused.

ALFRED WELLINGTON and another v. JOSEPH SCOTT.

The substitution of a second note, payable to different payees, in place of the first, is a novation of the debt.

APPEAL from the Commercial Court of New Orleans, *Watts, J. G. B. Duncan*, for the appellant.

Durell, for the defendant.

MARTIN, J. The plaintiffs are appellants from a judgment rejecting their claim against the defendant on a note of the firm of Palmer, Allen & Co., of which the defendant was a partner.

The claim was resisted on an allegation that the note had been extinguished by Palmer & Whiting, a firm of which Palmer, who had been one of the firm of Palmer, Allen & Co., was a partner, by a note of theirs, made in the pretended liquidation of the firm of Palmer, Allen & Co. payable to said Palmer, Allen & Co. for one thousand dollars, and endorsed by said Palmer & Whiting, in the name of Palmer, Allen & Co., whereby the original note was novated. The defendant averred that Palmer & Whiting had no authority to draw the note in liquidation of the firm of Palmer, Allen & Co. which had been previously dissolved, nor to endorse thereon the name of the firm, of all which the plaintiffs had knowledge. The record shows that on the maturity of the note sued on Palmer & Whiting gave their note for the same amount as the first, payable to the order of Palmer, Allen & Co. and Amanda Hogue, the said Amanda being the payee of the first note; that Palmer & Whiting, without any authority therefor, placed the signature of Palmer, Allen & Co. on the back of the said note, and that Amanda Hogue by a distinct endorsement, transferred all her rights and interest in the note to the plaintiffs. The testimony establishes all the allegations in the answer, and that the note sued on was endorsed to the plaintiffs after its maturity, and after the second note had been substituted therefor. It was therefore novated by the substitution, for the second note was made payable to different payees.

Judgment affirmed.

Bataille and another v. The Firemen's Insurance Company of New Orleans.

**HIPPOLITE BATAILLE and another v. THE FIREMEN'S INSURANCE
COMPANY OF NEW ORLEANS.**

Defendants advertised for sale, "the hull, spars, sails, and rigging, of the schooner Louisiana, lying high and dry on a certain island." The advertisement represented "that she was well found, her sails unbent, and her running rigging stowed below; that there was some cargo on board, which might entitle the purchaser to an advantageous salvage; and that she was left in the charge of three trusty persons." Plaintiffs purchased, and four days afterwards proceeded to the wreck, which they found at a different place from that advertised, and burnt to the water's edge. A witness deposed that it had, from all appearances, been burnt before the sale. *Held*, that if the burning occurred before the day of sale, there was no sale, C. C. 2430; if after, but before possession could have been taken with reasonable diligence, that defendants were liable, under arts. 2443. 2444, for the acts or neglect of the persons they announced as keeping her; that the delay of four days was not unreasonable; and that defendants having, to enhance the price, made representations, in the nature of a warranty, calculated to mislead the purchasers, are responsible for the expenses to which the latter were subjected through their fault.

APPEAL from the Commercial Court of New Orleans. *Watts, J.*
MORPHY, J. The petition charges that on the 28th of November, 1839, the defendants caused to be sold at public auction the hull, yards, sails, and rigging of the schooner Louisiana, of which the plaintiffs became the purchasers for the sum of one hundred and forty dollars; that in the notices of sale published in the newspapers, it was represented that the hull of the said schooner was wrecked high and dry on the Last Island, sixty miles west of the South West Pass; that there was on board every thing necessary, the sails and rigging having been stowed in the hold for safe keeping; that part of the cargo was on board, and that Captain Auld had left three faithful and trusty men to take care of her.*

* The advertisement was as follows:—"By J. A. B. for the benefit of the underwriters. Will be sold on Thursday the 28th instant, at 12 o'clock, at the St Louis Exchange, the hull, spars, sails, and rigging of the fine schooner Louisiana, Capt Auld, as she now lies high and dry on Last Island, sixty miles west of the S.W. Pass. The vessel is well found, and her sails unbent, and her running rigging unwove and stowed below. There was some cargo on board, which may entitle the purchaser to an advantageous salvage. She lies secure from ordinary gales, and was left in charge of three trusty persons by Capt. Auld.

"For further particulars, apply to Capt. Auld, or at the office of the auctioneer, 58 Common St."

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That in order to effect the salvage of the said schooner Louisiana, the plaintiffs incurred expenses to the amount of four hundred and twenty-five dollars, besides the price paid by them for the hull of the schooner. That when the persons sent by plaintiffs in search of the vessel arrived at the place designated at the sale, they did not find her there, but found that she was at another place called Vine Island: that she was burnt to the water's edge, instead of being safely kept by three faithful guardians; and that no part of the rigging or cargo was to be found on board. That the said hull was in so miserable a condition as to be absolutely useless to the plaintiffs, and so situated that had the plaintiffs been informed of the real condition of the schooner they would not have purchased her, nor incurred such heavy expenses. That the defendants, by whose fault and on whose representations the plaintiffs were subjected to the loss of \$565, are bound in law and equity to reimburse said sum to them, with \$300 damages for the profits which plaintiffs might have made on said purchase, and which were held out to purchasers by the notices printed in the newspapers. The defendants excepted to the plaintiffs' demand, averring that all their allegations, even if true, present no legal cause of action against them; and in case their exception be overruled, they plead the general issue. There was judgment below for \$865, from which the defendants have appealed.

Canon, for the plaintiff.

Micou, for the appellants. The sale was complete by the adjudication. Civ. Code, 2431. The thing sold is at the risk of the purchaser, from the completion of the sale. *Ib.* 1913, 2442. There is no allegation in the petition that the property did not exist at the time of the sale, *Ib.* 2430; nor that it was destroyed, through want of care in the vendor. *Ib.* 2443. If any cause of action be stated in the petition, the judgment should still be reversed, the damages allowed being excessive.

MORPHY, J. The petition is far from being as distinct and explicit in stating the legal grounds of this action, as could be desired; but from the whole tenor of its allegations, it is clear that the plaintiffs seek to recover their purchase money, with damages, on the ground that the subject matter of the sale did not exist at the time of the sale, and that there was an implied warranty that the vessel and

articles sold, existed at the place designated when they were advertised and sold. The exception, and the merits were tried together; and evidence was received tending to show that the vessel had been destroyed or had ceased to exist before the sale, thus presenting for the consideration of the court the only legal ground on which perhaps a recovery could be had.

On the material facts of the case we see no reason to differ from the judge *a quo*, who considered them as sufficiently established. The notices of the sale, independent of the high coloring given to the speculation held out to the bidders, and the exaggeration as to the salvage to which the cargo left in the schooner might entitle the purchasers, must have lead the purchasers to expect not only that the vessel was at the time of the sale in the condition represented, but also that she would remain under the charge of three trusty men, for a reasonable time, until the purchaser could proceed and take possession of her. Under this understanding of the matter, one of the witnesses tells us that in storing provisions for himself and his companions during the excursion, he took in extra provisions for the hands he expected to find on board of the schooner; and that she was not to be seen at the place designated, and was found at another place abandoned and burnt to the water's edge, apparently since about a fortnight. If the destruction of the vessel took place before the day of the sale, there was no sale. Civ. Code; art. 2430. If it occurred since the sale, and before possession could reasonably have been taken of her by the purchasers, the defendants are liable for the acts or neglect of the persons who they announced were keeping the vessel at the designated place. Civ. Code, arts. 2443, 2444. The plaintiffs chartered a schooner, and employed hands who left the city four days after the sale. This delay was not unreasonable to make the necessary preparations. We think the plaintiffs are entitled to the reimbursement of the purchase money, and such expenses as they were led to make in order to take possession of the schooner and obtain the handsome salvage the advertisement had promised them. If instead of selling the vessel as she was left by her captain at the time of the wreck, the defendants, with a view to enhance the price, took upon themselves to make representations in the nature of a warranty, calculated to mislead the bidders, they must

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take the consequences. As to the claim of \$300 for damages, it is not supported by a tittle of evidence.

It is therefore ordered that the judgment of the Commercial Court be reversed, and that the plaintiffs do recover from the defendants, the Firemen's Insurance Company of New Orleans, the sum of five hundred and sixty-five dollars, with legal interest from the day of judicial demand, and costs below ; those of this appeal, to be paid by the appellees.

JEAN ADOLPHE BLANC v. THE NEW ORLEANS IMPROVEMENT AND
BANKING COMPANY.

An agent is entitled to recover expenses incurred by him in the execution of his agency, even when he has been absolutely unsuccessful, unless it be shown that it was the intention of the parties that the principal should pay nothing in case of failure. Otherwise, with a broker employed to sell a house, who, whether successful or not, is not entitled to recover money spent by him in his agency.

A broker can claim nothing unless a bargain be effected.

APPEAL from the Commercial Court of New Orleans, *Watts, J. J. F. Pepin*, for the plaintiff. No counsel appeared for the appellant.

MARTIN, J.* The plaintiff, Blanc, claims two thousand five hundred dollars, for his travelling expenses, under the following written contract : " J. A. Blanc, being about to go to Europe, will attend to the negotiation of a loan of three millions of francs, for the bank, who will pay him, for his care (*ses soins*) a commission of three per cent, after the loan shall have been effected ; the bank lends him one thousand dollars, on his note at twelve months, which is to become payable sooner, should he become entitled to any commission, under this contract, before the end of the year ; the contract to be in force until the 1st of January, 1840, a period of about ten months. If renewed afterwards, the payment of the note to be protracted until the expiration of the new contract."

The answer avers that the plaintiff did not succeed in effecting

* MORPHY, J., being interested, did not sit on the trial of this case.

any loan, and is therefore entitled to no compensation ; and claims the amount of his note, in reconvention. The plaintiff had judgment for fifteen hundred dollars, the judge *a quo* being of opinion that the right of a mandatary to his expenses, being a legal right, can only be cut off by the express contract of the parties ; that no such express agreement appears ; and that although there is a color for the defence made, that it was not sufficiently strong to destroy the right. The defendants appealed.

The record shows that the defendants admitted that the plaintiff visited France, England, Switzerland, Italy, Piedmont and so forth, in his attempt to effect the loan, and that he used his best efforts therefor. The plaintiff admitted his signature to the note, and its protest for non-payment. His counsel has referred us to the Civ. Code, arts. 2991 and 2278. Nap. Code, art. 1999. Duranton, book 18, p. 269. Locré, Legislation, book 8, p. 355. Pothier, traité du Mandat, No. 68, *et seq.*

These authorities show that the agent is entitled to the reimbursement of the expenses he has incurred in the execution of his agency, even where he has been absolutely unsuccessful. This is certainly true, where the contract does not show that it was the intention of the parties that the principal should pay nothing in case the object of the agency was not effected, and in case of success a *per centage* merely ; as in the case of a broker employed to sell a house, who, whether he succeeds or not, is not entitled to the reimbursement of money spent in hack, cab, or horse hire, in looking for a purchaser. In the present case, it results from the contract that the plaintiff was employed, because he was going to Europe, on other affairs than those of the agency for the bank. He obtained an advance of one thousand dollars, on an express promise to repay the amount, which excludes the idea that he might retain the sum or any part thereof for his expenses. When the contract speaks of his payment, the period is expressly stated to be after the loan is effected. The impression which the consideration of this case has left upon our minds, is, that the plaintiff, who was about visiting Europe, on other affairs than those of the defendants, was desirous of obtaining, from them a loan of one thousand dollars, and of availing himself of a chance of obtaining a commission of eighteen thousand, and that the contract

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was merely one of brokerage, where nothing is paid, unless a bargain is effected.

It is therefore ordered, that the judgment be reversed, and that there be judgment for the defendants on the plaintiff's petition, and that the latter recover from him on their plea in reconvention, the sum of one thousand dollars with interest at the rate of five per cent per annum, from the 15th of February, 1840, until paid; with costs in both courts.*

* *Pepin* for a re-hearing urged: 1. That the court had erred in assuming as a fact, that the plaintiff went to Europe on other business than that of his agency for the bank, the admission of the defendants having shown the contrary. 2. That it erred in declaring that a broker is entitled to no compensation, unless a purchase or sale be effected by him. The Civ. Code, art. 2996, says that the obligations of a broker are similar to those of ordinary mandataries. Their duties being the same as other agents, their rights should be the same. *Eadem ratio, eadem lex.* Art. 2991, which declares that the expenses and charges of an agent should be reimbursed, speaks of all agents; it makes no distinction. *Ubi lex non distinguit, non debemus distinguere.* That agents are in all cases entitled to this reimbursement, see Story on Agency, 335. Livermore on Agency, b. 2, pp. 1, 2, 11—33. See also, Paley on Agency. Pothier, du Mandat, 68—71, 78, 79. Duranton, liv. 18, p. 269. 3. But admitting that brokers are not entitled to compensation unless they succeed, the facts show that the plaintiff did not act as a broker, but as an attorney empowered to procure a loan. Story on Agency, sec. 28. "*Il n'est point également possible,*" says Pardessus, Droit Comm. part. 1, tit. 1, ch. 1, sect. 7, No. 41, "*de confondre le courtier avec le simple fondé de pouvoir ou le préposé; car s'ils ont cela de commun qu'ils ne s'obligent point en leur nom propre, il y a toujours cette différence essentielle que le mandataire, ou le préposé, ne se borne pas à être intermédiaire pour porter et discuter des propositions, mais il achève et conclut l'affaire qui lui est confiée dans la mesure des pouvoirs qu'il a reçus.*" 4. The court erred in inferring, from the circumstance that the loan of \$1000 was to be repaid, that the plaintiff was not to have his expenses reimbursed. The agreement to repay the \$1000, is not inconsistent with the payment of the expenses incurred by the plaintiff.

Re-hearing refused.

EDWARD W. SEWALL v. CELESTE DUPLESSIS.

Builders who contract with tenants for alterations or repairs of the premises leased, have no lien or privilege on the premises. There is no privity between the builder and the owner.

Art. 2697 of the Civ. Code, which provides that a lessee may remove the improvements and additions he has made to the thing let, provided he leave it in the state in which he received it, cannot be extended by implication to builders who contract with such lessees. Such contractors must be considered as having done the work on the personal credit of the lessee; and they have no right to remove the materials used in such repairs and improvements, on the ground that they have not been paid for.

APPEAL from the Commercial Court of New Orleans, *Watts, J. BULLARD, J.* The plaintiff represents that, at the instance and request of Edward Duplessis, the lessee of the defendant, he made various buildings and improvements on the lot of ground owned and now occupied by her in Bourbon street, and particularly that he put two additional stories on the back buildings, and re-slatted the roof; and that he built a gallery the whole length of the main building, and repaired the yard, as will appear by the written contract. He represents that the value of the work and materials was several thousand dollars, and that the enhanced value of the property was also several thousand dollars. That there is due to him a balance of \$1287 56, which Edward Duplessis has neglected and refused to pay, and that he has a right to demand payment of the defendant, or to have the work done by him demolished, and the materials sold to satisfy his demand. He prays for judgment accordingly.

The evidence shows that the work was done, and that the property was benefited by it. It is admitted that, for the balance claimed, Edward Duplessis gave notes drawn by himself, and endorsed by Clark, which were protested for non-payment.

The Commercial Court being of opinion, that the right given to tenants or lessees by art. 2697 of the Code, of removing improvements and additions made by them, provided they leave the property in the state in which they received it, could not by implication be extended to undertakers, gave judgment for the defendant; and the plaintiff has appealed.

Benjamin, for the appellant.

1. The judgment of the court below is erroneous in refusing to plaintiff the right to remove from defendant's property the materials used in improving it, on condition of his leaving it in the same state as when leased. This case is altogether different from that of *Hoffman v. Laurans* referred to by the judge *a quo*. Here the workman claims nothing from the owner of the property, demands no judgment against her, but merely prays that she be not allowed to enrich herself at his expense; that he be permitted to take away his own materials, for which he has not been paid. The defendant insists on keeping them without paying. *She* is before the court *causa lucri captandi*, *he* is before the court *causa damni avertendi*; and even if the case were doubtful, the court should give him a judgment.

2. The plaintiff does not, as in *Hoffman's* case, rely on any fanciful analogy between lessees and usufructuaries, for the purpose of asserting a right conceded to the latter but denied to the former. He relies on the right given by law to the lessee directly. See art. 2697, Civ. Code. In France, the question now before the court has been adjudged in favor of the defendant, and the adjudication put expressly on the ground that the French Code did not give to the lessee the right which our Code has conferred by art. 2697. See the case of *Martin v. Califfet*, 19 Sirey, 414. Our legislature have, by this article, expressly changed the French law in this particular, and the Code of Louisiana gives the right we claim, not only in the art. 2697, but by art. 500, where the general rule is laid down in unequivocal terms.

No counsel appeared for the defendant.

BULLARD, J. It is difficult to distinguish this case in principle from that of *Hoffman v. Laurans*, 18 La. 70, in which we held that builders who contract with tenants for the repair and alteration of the premises leased, have no lien or privilege on the property under lease, there being no privity between the builder and the owner of the premises. The plaintiff's counsel endeavors to make a distinction, by insisting that in the present case the plaintiff claims nothing from the owner, demands no judgment against her, but merely prays that she may not be permitted to enrich herself at his expense, and that he may be permitted to take away

his own materials for which he has not been paid. The right to take away materials must depend upon some lien or privilege *in rem*, conferred by contract either express or implied. If the defendant be bound to submit to such a removal, the obligation to permit it must be the correlative of a corresponding right on the part of the builder to take away the materials, which right can have no legitimate source but in positive law, or the consent of the defendant.

The law certainly gives no such right expressly; if it did, it would be essentially a lien or privilege. Will it be said that the defendant's consent results from the fact that she is enjoying the benefit of the plaintiff's labor; to this it may be answered, *non constat* but that she has already paid her tenant, on whose credit the improvements were made, or that the making of them was not one of the conditions of the lease.

But it is manifestly impossible for the plaintiff to exercise the right of taking away the materials not paid for, and leave the premises in their former condition. About three-fourths of the price of the materials and workmanship have already been paid; that is to say, three-fourths of every brick, and plank, and slate have been paid for. How is it possible to separate them so that the builder may proceed without taking a part which he does not even pretend a right to take, and how can the buildings be reinstated as they existed before, and who is to judge of the matter?

We concur with the court below in the opinion, that the privilege given the lessee by article 2697 of the Code, ought not to be extended by implication; and that undertakers, who do work for tenants or lessees, must be considered as doing it upon their personal credit.

Judgment affirmed.

PIERRE ALEXANDRE MASSÉ v. JOSEPH BARTHET.

A return of no property found after demand of the parties, made by the sheriff on a *feri facias* against the defendant, in an action in which sequestered property had been released on a bond, is sufficient evidence of a breach of the condition of the bond given for the release of the property sequestered, in an action against the surety.

APPEAL from the District Court of the First District, *Watts, J. Canon*, for the plaintiff. No counsel appeared for the defendant.

BULLARD, J. This is an action upon a bond subscribed by the defendant as surety, which was given to the sheriff in the case of the plaintiff against one Brehier, in order to release certain property from sequestration. The defendant admitted that he subscribed the bond, and that the apothecary's shop was released from sequestration, but he denies that the value of the shop was in any degree diminished. He further avers that when the property was sold under a *fi. fa.*, the plaintiff himself became the purchaser; and that having failed to comply with the conditions of the sale, it was sold at his risk, and adjudicated to the respondent, who found it so well provided, that sometime afterwards he sold it for \$4000.

The defendant having failed to sustain this special plea, there was judgment against him, and he has appealed.

The record shows that, on the issuing of an execution in the original case, the sheriff returned no property found, after demand of the parties; and the court justly concluded that this return furnished sufficient evidence of a breach of the condition of the bond.

Judgment affirmed.

Landis and another v. Darling and another.

JOSEPH LANDIS and another v. E. C. DARLING and another.

A party having purchased of plaintiffs a quantity of flour for cash, to be shipped on a vessel bound to a foreign port, it was delivered on board and receipts taken for it in the name of the plaintiffs. The purchaser never paid for the flour; but obtained from the master of the vessel, to whom he consigned it, bills of lading therefor without having produced the receipts given to the vendor, and an advance to be repaid with commissions and freight. In an action by plaintiffs against the master to recover the flour, *Held*: that it is an established usage, where goods are purchased for cash to be shipped for exportation, for the vendor to take the receipts of the officers of the vessel in his own name, to be delivered to the purchaser when the price is paid, that the latter may obtain a bill of lading from the master on their production; that the possession of the flour never ceased to be in the plaintiffs; and that the master acted in his own wrong in giving a bill of lading to the purchaser, and in making advances before delivery to the latter had been effected by the surrender of the dray receipts to him.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Benjamin, for the plaintiffs. No counsel appeared for the appellant.

MORPHY, J. The petition alleges that on the 1st of April, 1839, the plaintiffs sold to one Darling, two hundred barrels of flour, at six dollars and three-fourths per barrel. That the sale was made for cash, and that the plaintiffs were requested by the purchaser to ship said flour on the brig *Apalachicola*, Latham, master, bound for Havana. That being unwilling to deliver the flour without being paid therefor, the plaintiffs sent it on board of said brig, but took receipts for it in their own name, and paid twelve dollars and fifty cents for drayage in sending it on board the brig. The petition further represents that since then the plaintiffs have been unable to find the said Darling, or to obtain from him the price of the flour and the expenses of drayage, and that the said Latham, the master of the vessel, refuses to deliver back to them the said flour which they are entitled by law to reclaim in kind, the same not having been paid for. The petition concludes with a prayer for the sequestration of the flour, and for a judgment decreeing the said Darling and Latham to restore the flour to the plaintiffs, or to pay the value thereof. The defendant, Latham, answered, averring that on or about the 1st of April he, as master of the brig *Apalachicola*, entered into a contract of

affreightment with a person named E. C. Darling to carry to the Havana two hundred barrels of flour. That the flour was sent on board of his brig by said Darling, and consigned to him in consideration of his having advanced on account thereof \$900, which was to be paid to him with five per cent commission for advance, and seventy-five cents per barrel for freight, for all which he has a privilege and lien on the flour. The shipper having delivered and consigned it to him, and having received from him bills of lading for the same, previous to any claim from the vendors of the flour, whose rights, if any they have, were entirely unknown to him. *The answer prays for judgment against Darling and plaintiffs for the sum of \$1375, with privilege on the flour; and for the further sum of one thousand dollars, damages against the plaintiffs, for having illegally sequestered and detained his brig for four or five days after she was prepared to sail for her port of destination. There was a judgment below in favor of the plaintiffs for \$1200, with privilege on the flour sequestered.* Latham has appealed.

The evidence shows the well established commercial usage to be, that when goods are purchased for cash, with the request that they be sent on board of a vessel for exportation, the merchant takes, in his own name, the receipts of the officers of the vessel, and when the purchaser comes and pays for the goods, the receipts are handed over to him. The reason given for this usage is, that the seller may retain possession of his goods until they are paid for. Several witnesses testify that the master of a ship never signs a bill of lading until these receipts are produced and returned to him; and that their strictness in this respect is such, that when any dray receipts are missing, some captains require an indemnity bond against such receipts before signing the bills of lading. The sale in this case was a cash one, and Darling never paid for the flour, nor called for the receipts, which were all taken in the name of the plaintiffs. Before the flour was sequestered, the captain acknowledged that he had received it from the plaintiffs, and even offered,

* Plaintiffs claimed two hundred barrels at \$6 75. MAURIAN, J. "The plaintiffs having delivered the flour on Latham's vessel, are bound, on taking it back, to pay the freight, which is proved to have been seventy-five cents a barrel, or \$150, which deducted from \$1350, leaves a balance of \$1200 due to the plaintiffs."

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at one time, to sign the bill of lading for them, but afterwards refused to do so when called upon. The court correctly decided, we think, that the possession of the flour had never ceased to be in the plaintiffs, and that the master acted incautiously and in his own wrong, when he gave a bill of lading for the flour to Darling, and made advances on it before the delivery to him was effected by the surrender of the dray receipts.

Judgment affirmed.

EBENEZER EATON KITTRIDGE v. EUGENE LANDRY.

It will be no objection to the admissibility in evidence of an act, executed by plaintiff's vendor, in relation to the land in dispute, that no evidence was adduced of its having been recorded in the office of the parish judge, without which it could have no effect against third persons. Whether the act is binding on the plaintiff, is a question going to the effect, and not to the admissibility of the instrument.

An instrument offered in evidence, will not be rejected on the ground that it appears to have been wrongfully obtained. It will be received, and its effect tested afterwards.

Parol evidence is admissible to sustain a plea of prescription, by establishing possession, its character, and other requisites to sustain the plea; or to disprove it, by showing that the party did not possess as owner, or had renounced the benefit of prescription.

The seventh section of the act of Congress of 11th May, 1820, reviving sect. 5 of the act of 3d March, 1811, authorizing the owner of any tract of land bordering on a water course in the territory of Orleans, to purchase, by preference, any vacant land not exceeding a certain quantity, in the rear of, and adjacent to his tract, continued in force by sect. 1 of the act of 28th Feb., 1823, requires that the land to which such privilege is given, should be included within limits produced by the extension of the side lines of the front tract in the same direction; it contemplates no variation, but in the event of its being found necessary to divide the back lands among several claimants.

Surveys made by surveyors in the service of the United States, though sanctioned by the Principal Deputy Surveyor of the District, may be corrected when erroneous. A notarial act, by which it was agreed that certain lines should form the boundary between the lands claimed by the parties thereto, not recorded in the office of the Parish Judge, is void as to third persons, or innocent purchasers without notice.

APPEAL from the District Court of Assumption, *Nicholls, J.*

GARLAND, J. The petitioner represents that on the 3d of May, 1822, André Le Blanc was the owner and proprietor of a tract of

land in the parish of Assumption, on the bayou Lafourche, containing five *arpens* front, by forty in depth, bounded above by the land of Paul Landry, and below by that of Jean Louis Landry. That on the day aforesaid, and on the 28th of August, 1824, the said Le Blanc, in compliance with two acts of Congress, passed on the 11th of May, 1820, and the 28th of February, 1823, authorizing the inhabitants of Louisiana to enter the lands adjacent to, and in the rear of their front tracts, purchased from the United States certain vacant lands adjacent to, and in the rear of his front tract, not exceeding in quantity the number of *arpens* in the front tract, as will appear by the receipts of the Receiver of Public Moneys for the South Eastern Land District; which lands were located and surveyed in the months of April, 1830, and May, 1837, and the location and survey approved by the Surveyor General of the United States for the state of Louisiana.

The petitioner further represents that he is now the owner and proprietor of the land so purchased by Le Blanc. That he, and those under whom he claims, had always been in quiet and peaceable possession, by a legal title, until the month of January, 1837, when the defendant, under pretence of having a title thereto, took possession of a portion of said land so claimed by him, and has committed waste and damage on the same by cutting down and destroying valuable timber, to the damage of the petitioner, \$2000. He, therefore, prays that the defendant be adjudged to restore and deliver to him so much of his land as he has taken possession of; that his (petitioner's) title be declared good and valid; and that he recover the damages before stated.

The defendant, after a qualified general denial, avers that he is the absolute owner of a tract of land in the parish of Assumption, on the right bank of the bayou Lafourche, in the rear of, and adjacent to a tract that belonged to Mdme. Celeste Breaud, which was acquired by him in January, 1826, from Celestin Mollere, bounded above by vacant land, and below by a tract of land purchased by André Le Blanc of the United States, the upper part of which was then occupied by Guillaume Mollere. That Celestin Mollere purchased said tract of land from the United States on the 28th of August, 1824, under the acts of Congress of May 11th, 1820, and of the 28th of February, 1823, and that the same

was surveyed and located in April, 1825, by Grinage, a Deputy Surveyor of the United States, and the survey and location approved by Turner, the Principal Deputy Surveyor of the District.

He alleges that Le Blanc's entry or purchase was surveyed and located in May, 1823, by Auguste Bonnet, a Surveyor of the United States, and also duly approved by T. Wilson, the Principal Deputy Surveyor of the District; and that the upper boundary line of Le Blanc, as surveyed by Bonnet, coincides with the lower boundary of the claim of Celestin Mollere, as surveyed by Grinage.

It is alleged that in the month of April, 1833, the said André Le Blanc, with the respondent, and several other persons, entered into an agreement by notarial act, by which it was stipulated that they should consider and maintain the surveys made, and lines drawn by Auguste Bonnet, as good and valid, so far as related to them or their assigns.

It is further answered, that the respondent, and those under whom he claims, have for more than fifteen years been in actual possession, under the aforesaid boundaries and titles, as owners, whereby he has acquired a title by the prescription of ten years.

The respondent further alleges that he has made valuable improvements on the land, by clearing it, and erecting houses, fences, and other works, to the value of \$2000. That he is a possessor in good faith, and, in case of eviction, is entitled to compensation for the same. He therefore asks that plaintiff's claim be rejected; but if allowed, that he recover the sum of \$2000 for the improvements.

After this answer had been filed, the plaintiff was permitted, by a supplemental petition, to call Lazare Hebert, his immediate vendor, in warranty, for the purpose of prosecuting this suit. The record does not show that he was ever cited or appeared; but André Le Blanc and wife, who were not made parties, were cited, and the former appeared, and excepted to answering. His exception was overruled, and no other notice is taken of any of them on the trial.

The evidence shows that Le Blanc purchased his back lands on the 3d of May, 1822, and the 28th of August, 1824, as is more particularly stated in the opinion delivered in the case of

Kittridge v. Breaud, decided at the present term, *ante* p. 40, and had them surveyed as therein stated. The plaintiff holds under him by different mesne conveyances. The early surveys of Bonnet show that, instead of extending the side lines of the front tract, the upper of which ran south $74\frac{1}{2}^{\circ}$ east, until the proper quantity could be obtained, that surveyor changed the direction of that line, when he commenced measuring the back land, and ran it south $85^{\circ} 45'$ west, in consequence of which, the land purchased by Le Blanc was not directly in the rear of his front tract, although adjacent thereto.

Celestin Mollere, the vendor of the defendant, purchased the tract of land claimed by him on the 28th of August, 1824, under the same act in relation to the entry of back lands under which Le Blanc had purchased. In locating it, the surveyor, Grinage, ran the lines in the same manner as Bonnet had, and returned his plat, which was approved.

When these surveys were made, there had been no general survey of the lands in that quarter of the country; and when, several years afterwards, one was made, under the direction of the Surveyor General of the United States, no attention seems to have been paid to the surveys of Bonnet and Grinage, or if noticed, they were disregarded; and the lines of various back tracts of land were run by continuing the side lines of the front tracts on the same courses, until they extended far enough to include the quantity desired.

The defendant purchased the land in 1826, by an authentic act duly recorded, and has ever since been in possession within the boundaries fixed by Grinage. Nearly the whole of the 21,500 acres in dispute is cleared, and has been in cultivation for ten or twelve years. The possession of the defendant has been open, continuous, and within the boundaries above stated.

At the trial, all questions in relation to improvements and damages were reserved. There was a judgment in favor of the defendant, and the plaintiff has appealed.

Connely and Ilsley, for the appellant.

Miles Taylor, contra. The defendant acquired the tract of land as represented in the survey made by Grinage in 1825, in good faith, and by a just title, and has been ever since in the continu-

ous, uninterrupted, peaceable, public, and unequivocal possession thereof as owner, and is entitled, to the benefit of the prescription of ten years. Civ. Code, arts. 843, 849, 3442, 3445, 3449, 3450, Nos. 1, 2, 3.

The notarial act recognizing the line run by Bonnet, executed by A. L. Blanc and others, was improperly rejected. The plaintiff is not a third person. He stands in the place, and is bound by the acts of his vendor. Civ. Code, art. 3522, No. 29. 2 Moreau's Dig. 286, § 7. *Stafford v. Grimball*, 1 Mart. N. S. 554.

Parol testimony to prove that defendant had agreed, after his title had become perfect by prescription, to hold the land in dispute from the plaintiff as his lessee, was properly refused. The tacit renunciation of prescription, which would result from such a fact, *would in effect transfer immoveable property*; such a transfer can only be established by written proof. Civ. Code, arts. 1813, 1818, 1820, 1840, 2255. 5 Mart. N. S. 250. 4 La. 377.

GARLAND, J. In the course of the trial in the District Court, the defendant offered in evidence the notarial act mentioned in his answer as having been made by Le Blanc, himself, and others, in which they agreed to maintain and abide by the lines and boundaries made and fixed by Auguste Bonnet, for the purpose of proving the allegation in the answer. To the reception of this document, the plaintiff, by his counsel, objected, on the ground that there was no evidence that the act had ever been recorded in the office of the parish judge, and that it could have no effect against third persons. The court sustained the objection, and the defendant excepted. In this we think the judge erred. The act was certainly good between the parties, and bound them so far as related to lands that belonged to them. Whether it bound one claiming under either of the signers, was a question that went to the effect of the instrument and not to its admissibility. In 6 Mart. 702, it was decided, that a deed offered in evidence ought not to have been rejected on the ground that it appeared to have been wrongfully obtained. It should have been admitted, and its effect tested afterwards. In this case, the registry was not essential to make the act valid. The copy was obtained from the notary who had charge of the original; and it might have been shown by other evidence than a certificate on the copy, that the original had been

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recorded. The document comes up with the record, and we are enabled to consider its effect on the rights of the parties.

The second bill of exceptions is taken by the plaintiff. In the course of the trial he offered parol evidence to prove the defendant had made proposals to lease the land in dispute, and had by his acts renounced any title he might have acquired by prescription; and to show, further, from his own acknowledgments, that he did not possess as owner, but considered his possession as that of the plaintiff. To this the defendant objected, on the ground that no parol evidence could be introduced to affect the defendant's title acquired by prescription. The objection was sustained, and the plaintiff excepted. In this we think the court again erred. To maintain the plea of prescription, parol testimony is most generally resorted to for the purpose of proving possession, its character, and other requisites necessary to sustain the plea, and maintain a title under it. If parol evidence be admissible to establish a title by prescription, it is certainly also admissible to rebut the legal presumption of a title, arising from a certain state of facts. A party might have an apparent good title to property, and yet, knowing that there were defects in the claim, admit it, and thereby destroy the good faith necessary to sustain the prescription of ten years. The conclusion to which we have come on the bills of exception, renders it necessary to remand the cause for a new trial; but in doing so, we shall express an opinion on some of the points presented, which may enable the inferior court to decide the cause with more facility, and finally settle the rights of the parties.

As to the surveys made by Bonnet and Grinage, we think that they were not made in conformity to law; nor do they come within the spirit of the acts of Congress granting pre-emption rights to the lands adjacent to and in the rear of the front tracts. Those acts contemplated that the quantity should be obtained and included within limits, drawn by an extension of the side lines of the front tract, in the same course; and no variation seems to have been contemplated, unless it should become necessary to divide the back lands among several claimants. 1 Land Laws, 588, § 5, Opinions and Instructions in relation to the Public Lands. In

this case it seems that there is land enough to give all the parties what they claim ; but the difficulty is where they shall take it.

The counsel for the defendant contends, that as the surveys were made by regularly appointed surveyors of the United States, and approved by the Principal Deputy Surveyor of the District, they are unalterable. We do not think so. If surveyors violate the law in their operations, it is in the power of the courts of justice to correct their errors ; and the sanction of the principal deputy of the district does not place their acts or his, beyond the control of the laws. We have held, on several occasions, that we could and would correct the legal opinions of registers, receivers, and other officers engaged in disposing of the public lands ; and we see no reason why the same control should not be exercised over the surveyors of the public domain. 19 La. 334, 510.

As to the agreement entered into by André La Blanc, the defendant, and others, to maintain and hold good the lines run by Auguste Bonnet, we are of opinion that it is not obligatory on the plaintiff ; that the agreement or contract not having been registered in the office of the parish judge, does not bind third persons or innocent purchasers without notice, any more than a mortgage or an anterior sale not recorded would do. The public surveys as exhibited in the Register's office or in that of the Surveyor General of the state, did not show the lines fixed by that agreement ; it was therefore inoperative. Had it been recorded, the plaintiff might have seen how the boundaries were adjusted and fixed, and might have known how to conduct himself in relation thereto. The agreement in fact amounts to an alienation of the quantity of land now in dispute ; and there is no evidence to show that the plaintiff was in any manner informed of it. He looked to the acts of Congress under which the author of his title purchased. They informed him that the lands he was authorized to purchase were to be in the rear of and adjacent to his front tract. When he looked to the latest surveys made under the authority of the Surveyor General of the United States, he saw the land purchased, so located, and the certificate of the Register or receipt of the Receiver showed that it should be there. It cannot therefore with propriety be said, that a private agreement, not recorded, should control all these

public muniments of title, after the property had passed into the hands of an innocent purchaser.

The counsel for the defendant insists, that the plaintiff is not a third person in relation to this contract, being the *ayant cause*, or transferee, of all the rights of Le Blanc, one of the parties to it. He says that the property came into his hands with this contract on it, and that he is bound by it. The Code informs us, that third persons are all those who are not parties or privies to a contract.* It is certain the plaintiff was no party to this agreement in relation to boundaries, nor is there any evidence that he was in any manner privy to it. This case is different from that of *Stafford v. Grimball*, 1 Mart. N. S. 554, in this, that the purchaser insisted on enforcing an agreement in relation to boundaries somewhat similar to the present against one of the parties to it, who resisted on the ground that the benefit of the agreement was not transferred by a mere sale of the land. There it was evident the purchaser knew of the contract relative to the boundaries, and not only assented to it, but wished to enforce it against a contracting party.

As to the plea of prescription it is not proper we should notice it now, as a portion of the evidence that may bear upon it, was excluded by the court below.

The judgment of the District Court is therefore annulled and reversed, and the case remanded for a new trial, with directions to the judge of said court, not to reject the testimony offered by both plaintiff and defendant mentioned in the bills of exception, and to conform, in his opinions, to the principle herein established, and otherwise to proceed according to law ; the defendant paying the costs of this appeal.

* Third persons, with respect to a contract or judgment, are all who were not parties to it. C. C. 3522, No. 32.

FELIX MOHAN, Curator, v. DANIEL DANA.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Randall*, for the plaintiff. No counsel appeared for the appellant.

GARLAND, J. This action was instituted to recover the amount of a promissory note, and of an open account for work and labor as a mechanic. As to the note there is no defence, with the exception of certain off-sets which are admitted. The only difficulty is as to the account. When this was presented to the defendant, he said he did not know whether it was correct or not, but referred both the curator, and his attorney, to one Samuel Shakspeare, who was his foreman, to adjust it. Shakspeare examined the account, stated the amount of credits to which the defendant was entitled, struck a balance, and at the foot wrote "E. E. January 3d, 1840," and signed his name, as an acknowledgment of the correctness of the claim. It was further proved that, at a subsequent period, the note and account were again presented to the defendant for payment, who did not deny the correctness of the demand, but again referred the attorney of the plaintiff to Shakspeare, who defendant said attended to the business for him. The agent always admitted the correctness of the account.

No counsel has appeared for the defendant in this court, nor has any ground been assigned on which the judgment ought to be reversed. It appears to us, that Shakspeare was authorized by the defendant to investigate the demand, and to certify its correctness, by which he agreed to be bound. His acknowledgment, therefore, must be held obligatory.

The plea of prescription cannot avail the defendant, as the account was acknowledged in writing by his agent.

Judgment affirmed.

WILLIAM M. LAMBETH and another v. JOHN MILTON.

Art. 644 of the Code of Practice, exempting the tools and instruments necessary for the exercise of the trade or profession of the debtor from seizure, was intended to encourage such useful trades and professions, by enabling the debtor to sustain himself and family by his own industry, and to hold out to the creditor the prospect of satisfaction from the future labor of his debtor; and in the cases to which it applies, will exempt the books of professional men from seizure. But where the debtor resides abroad, or has absconded, or permanently left the State, his linen, clothes, bed, arms, and the tools and instruments of his trade or profession, may be seized and sold for the payment of his debts.

APPEAL from the District Court of the First District, *Buchanan, J.*

Randolph, for the appellants.

Van Dalson, for the defendant. Art. 644 of the Code of Practice protects the books of a lawyer from seizure. See also *Curia Filipica*, part 2, ch. 16, No. 8.

MORPHY, J. The petitioners having attached a library, consisting of law books and other miscellaneous works, belonging to the defendant, an absent debtor, a rule was taken to set aside the attachment on the ground that the defendant was a lawyer, and his books were not liable to seizure under this process. The court, after hearing the parties, made the rule absolute as to the law books; and the plaintiffs have appealed.

The defendant's counsel relies upon article 644 of the Code of Practice, which exempts from seizure under execution, among other things, the tools and instruments necessary for the exercise of the trade or profession by which the debtor gains a living. In the case for which this article provides, we would probably have no hesitation in declaring that the books of professional men should be exempted from seizure. The law books of a lawyer are perhaps no less necessary to the proper exercise of his profession, than the tools of a mechanic are to the latter to enable him to carry on his trade. But this article contemplates, we apprehend, an entirely different case from the one before us. It is clearly dictated by public policy as well as by humanity. While it encourages the exercise of all useful trades and professions, it enables the unfortunate debtor to sustain himself and family by

 De Blanc, Syndic, v. Martin.

honest industry, and at the same time holds out to the creditor a prospect of obtaining his debt, by the future labor of his debtor with these privileged tools and instruments. Can any of these reasons apply to cases of attachment where the debtor is residing abroad, or has permanently left the state? Where a debtor has absconded, leaving behind him his linen and clothing, his bed, his arms, and military accoutrements, or the tools and instruments of his trade or profession, none of these effects can avail him in the manner and for the uses contemplated by law; and all his property of every description ought to be, and is liable to be seized for the payment of his debts. Article 241, under which defendant's books were attached, renders *all species of property* of the absent debtor liable to seizure. It is not, in our opinion, modified or restricted by article 644, which provides for a different case. The exemption which it pronounces in favor of one class of debtors, should not be extended to another class, differently situated, and not at all entitled to the same favor.

It is therefore ordered that the judgment of the District Court be reversed, that the rule taken by the defendant be discharged, and that the case be remanded for further proceedings. The costs of this appeal to be paid by the appellee.

CHARLES DE BLANC, Syndic, v. JOSEPH MARTIN.

The verdict of a jury will not be disturbed, unless manifestly erroneous.

A direct action is not necessary to establish the falsehood of a notarial act; it may be shown collaterally.

A notarial act will be presumed to be correct, unless the evidence leaves no reasonable doubt of the contrary.

Motion for a new trial by plaintiff, in an action to annul a mortgage, on the ground that the clerk of the parish judge, before whom the mortgage was executed, had entered into a conversation with five of the jurors, while they were at dinner, during a recess of the court and before the argument had ended, and told them that if they annulled the mortgage their own mortgages, if they had any, would also be annulled. *Held*, that the motion was correctly overruled, there being no evidence that any fact was communicated which had not been sworn to on the trial, nor that any of the jury were interested in the question.

APPEAL from the District Court of Assumption, *Deblieux, J. Miles Taylor*, for the appellant.

Isley and Nicholls, for the defendant.

BULLARD, J. This is a revocatory action, in which the syndic of the creditors of Materre seeks to annul a mortgage given by the insolvent to the defendant, bearing date the 23d July, 1839. The mortgage purports to have been given to secure the defendant against certain indorsements for the insolvent, together with a small *avancement d'hoirie*. The plaintiff alleges as grounds of nullity, that Materre was not at the time indebted to Martin, the defendant, nor was the latter liable for his debts as set forth in the act of mortgage; but that the act was fraudulent, and intended to deprive the creditors of Materre of their recourse on said property. The plaintiff further alleges, that Materre was in insolvent circumstances to the knowledge of Martin, and that if the latter was a creditor, the act was intended to give him an unjust preference. It is further alleged, that the act was not in fact passed on the day it bears date, but as the petitioner avers, and verily believes, about the month of November or December of that year, within three months of the failure of Materre; and that it was fraudulently antedated.

The defendant denies the fraudulent character of the act of mortgage as alleged, and avers that it was executed in good faith, and for a valid consideration; and that the endorsements intended to be secured have since fallen on the respondent by protest, and that the amounts have been really paid to the holders of the notes thus endorsed.

The case was submitted to a jury, whose verdict was for the defendant; and the plaintiff, after an ineffectual motion for a new trial, appealed.

The act recites endorsements to the amount of \$20,250, independently of \$1500 called an advance, which may be laid out of view—that is to say, four notes of \$2500 each, one of \$8850, discounted by Girod, and one of \$1400 to the branch of the Gas Bank at Napoleonville. The evidence shows that the defendant has been held responsible for the whole of the above amounts. There was, therefore, a valid consideration for the mortgage, ex-

cept as to the \$1500 received by Materre, as part of his wife's portion.

While it is shown that endorsements existed at the date of the mortgage, some of which had been given by the defendant on a promise of Materre, to secure him by mortgage, in his letter of the 8th of July, 1839, it is not proved, on the other hand, that he was otherwise the creditor of Materre at that period. The ground of nullity, therefore, growing out of the relation of debtor and creditor between the parties, and the alleged intention to give and to obtain an unfair preference over other creditors, entirely fails, unless it be shown that the act was, as is charged, antedated. And this brings us to one of the principal questions submitted to the jury, to wit, was the act of mortgage antedated? Upon this point there is no direct and positive evidence. There are presumptions more or less strong on both sides. In support of the instrument, is the fact that it was passed before the judge of the parish, acting as a notary public, and two witnesses; and it cannot be lightly presumed, that a public officer would become the accomplice or the instrument of a fraudulent contrivance. It is true it is written upon a separate sheet of paper, and that the inscription in the book of mortgages of the parish consists of an abstract and not a full copy; the former appears, however, on the book at its appropriate place and date. On the other hand it is rendered improbable, that Materre signed the act in the country on the 23d of July, by showing that checks appear to have been signed by him on a bank in the city, bearing precisely that date. But this improbability is weakened, by showing that men in business having frequent transactions with banks, when about visiting the country, leave checks already prepared with proper dates. Again, it is shown that the act was not recorded in the city until December, although it purports to bear date in July. These conflicting presumptions were submitted to a jury whose verdict it is our duty to respect, unless manifestly contrary to law or evidence. We are not prepared to say, however irregularly the public business may have been conducted in the office of the parish judge, that the jury gave too much weight to the presumption in favor of the verity of notarial acts. Our law does not require, it is true, that they should be

Kittridge v. Dugas.

proved to be false in a direct action ; they may be shown to be so collaterally. But, at least, such evidence should be produced as to leave no reasonable doubt.

A motion for a new trial was made on the ground of misconduct of the jury. The plaintiff produced an affidavit of R. B. Blanchard, who swore that on the 19th of May he was at the house of Pierre Blanchard ; that five of the jurors in the case, whom he names, were present ; that Desiré Le Blanc, the clerk of the parish judge, who had testified in the case, was present ; that he entered into conversation with said jurors, and told them that if they should annul the act of mortgage in favor of the defendant, Martin, then their own, if they had any, would also consequently be null ; that several jurors listened to the expressions, and said in reply *certainly*, or *certainement*, thus assenting to the proposition. This took place at dinner, during the recess of the court, before the conclusion of the argument. The court, in our opinion, did not err in overruling the motion for a new trial. It did not appear that any fact was communicated to the jury, which had not been stated on oath during the trial. Nor does it appear that any of the jurors had an interest in the question. The clerk of the parish judge urged an argument upon a part of the jury, which had been probably addressed in court to them all by the counsel employed to argue the case. It was a topic not to be neglected in such a case ; but might be answered with some plausibility by saying, that the presumption would be more strong against the act, if it were the only one which had been recorded irregularly.

Judgment affirmed.

EBENEZER EATON KITTRIDGE v. JEAN DUGAS.

Decision in *Kittridge v. Landry*, ante, p. 72, confirmed.

APPEAL from the District Court of Assumption, *Nicholls*, J.

GARLAND, J. The petition represents that Madame Charles Honoré Breaud was, on the 1st of June, 1836, the owner of a tract

of land of four *arpens* front on the bayou Lafourche, by forty in depth, on which day she entered and paid for the back lands, or double concession under the acts of Congress of June 15th, 1832, and February 24th, 1835, which authorized the inhabitants of Louisiana, to make such entries. A few days after this purchase or entry, Madame Breaud sold the lower half of this double concession to Raphael and Guillaume Mollere, who transferred it to the plaintiff, who took possession of the same.

The petitioner also represents, that he is owner and possessor of another tract of land containing one hundred superficial *arpens*, bounded above by the first described tract of land, and below by other lands belonging to him, and in front by land belonging to Eugene Landry. That he purchased said land from P. D. Blanchard, who acquired it by a mesne conveyance from the United States; and that he, and those under whom he claims, have been in peaceable possession since said purchase.

It is further represented, that the defendant has at different times, unlawfully entered upon and trespassed on the land, and committed waste by cutting down and destroying large quantities of timber, for which the land is principally valuable, in consequence whereof, and of other unlawful acts, damage to the amount of \$15,000 has been sustained. The prayer is, that the defendant be compelled to desist from his waste and trespasses, and be ordered to pay the damages claimed.

To this petition the defendant answered, that he is the owner of a tract of land on the said bayou, having five *arpens* and twenty-six *toises* front, with a depth of eighty *arpens*, which he acquired from Charles Maurin. That this tract of land consists of two tracts, one fronting on the bayou, and the other being the double concession. The back tract was purchased from the United States by Charles Maurin under the act of Congress of May 11th, 1820, authorizing the purchase of the back lands, which purchase or entry was surveyed and located by Grinage, a Deputy Surveyor. It is further stated that double concessions above and below this tract of land have been entered, surveyed, and approved by the Principal Deputy Surveyor of the land district, and that the lines all coincide. It is also stated, that a portion of the land held under Madame Charles Honoré Breaud, had been previously pur-

chased of the United States by Celestin Mollere, and was laid off and designated in April, 1825, by Grinage, which survey was approved by the Principal Deputy Surveyor for the Land District.

It is further answered, that by a notarial act passed in April, 1833, the respondent, André Le Blanc, Raphael Mollere, and others, being at that time the owners of various tracts of land adjoining each other, and having the lines running in the same direction, agreed that they would consider and maintain the surveys and lines made, and boundaries established by Auguste Bonnet, as good and valid so far as related to them or their assignees. In conformity with which agreement and boundaries, the respondent says that he has held possession more than ten years; and he pleads prescription.

The answer then sets up a claim in reconvention, for various trespasses and waste committed on the premises by the plaintiff; claims \$2,000 damages; and concludes with a prayer that the plaintiff be forever prohibited from committing any other waste or trespasses on the land.

On the trial, it was admitted that each party was the legal owner of the front tract of land, and "that each is the legal owner of the double concession such as was acquired by the respective purchasers from the general government, as stated in the pleadings." Both parties, as it appears from the testimony, have exercised various acts of possession, and continue to do so. The defendant had cut down a number of cypress trees. One witness says that he counted forty-six stumps of trees, which defendant said he had cut. The plaintiff had cut twenty cypress trees, which it is proved are worth from eight to fifteen dollars each. It is further established that the defendant, and a number of his neighbors, in conformity with the surveys of Bonnet have been in possession for at least fifteen years, which they agreed to confirm so far as concerned themselves, by their written agreement in April, 1833.

The difficulty in the case was caused originally, by the surveyors, Grinage and Bonnet, giving to the lines of the double concessions, a direction different from those of the front tracts. In this case the lines of the front tract run south $69^{\circ} 45'$ east, and those of the double concession north $87^{\circ} 50'$ west. The

surveys of the double concessions, were made previous to the general survey of that section of the country by the officers of the United States. The latter disregarded the surveys of Grinage and Bonnet, and ran out the lines of the double concessions on the same courses as those of the front tracts. These last surveys are also approved by the proper officers.

This action, although in its inception one of trespass, involves questions of title and boundary ; and the questions which arise are very similar to those decided in the case of the same plaintiff against Eugene Landry, *ante*, p. 72, with the exception that the location of Maurin's back lands, as made by Grinage, was never approved nor authorized by the Principal Deputy Surveyor of the district, or the Surveyor General of the United States, so that there was no obstacle in the way of a proper survey of the land purchased at the time it was last made.

The defendant in this case also insists on the contract passed before Materre, a notary public, in April, 1833, between himself, Le Blanc, and others, upon which we have commented in the case just decided. The remarks made are as applicable to this case as to that. The plaintiff is, therefore, not bound by it, as it was not registered. Another objection to the contract, so far as it relates to this case, is, that by maintaining the the lines as run by Auguste Bonnet, they would make the claim of the defendant cover land in the rear of another front tract, which back land then belonged to the United States, and would thereby deprive the owner of such front tract of the privilege of purchasing the back land, to which he was entitled.

On the plea of prescription we will not at this time express an opinion.

The judgment of the District Court is therefore reversed, the verdict of the jury set aside, and the case remanded for a new trial, with directions to the judge on the trial thereof to conform to the principles herein contained, and to those settled in the case of *Kittridge v. Eugene Landry* decided this day, so far as they are applicable to this case ; and otherwise to proceed according to law ; the costs of this appeal to be paid by the defendant and appellee.

ARTEMON HILL and another v. FRANCISCO DE LIZARDI and others.

Ships and other vessels can only be mortgaged, in accordance with the laws and usages of commerce.

APPEAL from the District Court of the First District, *Buchanan, J.*

J. C. Clarke, for the plaintiffs.

J. F. Pepin, for the appellants. The case of *Hill and another v. The Phoenix Tow Boat Co.*, ante, p. 35, decided that a mortgage of a vessel was not binding as to *third persons*. In this case the nullity is set up by a party to the contract.

MARTIN, J. The defendants are appellants from a judgment perpetuating an injunction, which the plaintiffs had obtained to prevent the sale of a steamboat of theirs under an order of seizure and sale, issued on an authentic act of mortgage given to defendants by the vendor of the plaintiffs. The counsel of the appellants has contended that their mortgage contains a clause *de non alienando*, and that by the act of sale by which the plaintiffs acquired the steamboat, they submitted themselves to the effect of the appellants' mortgage. It was admitted, that as to persons not parties, nor privies to the mortgage, its nullity might be urged; but argued that the plaintiffs' vendor, who gave the mortgage, and the plaintiffs who subjected themselves to its effect, are bound thereby.

It does not appear to us that the court erred. In the case of *Loze v. Dimitry et al.*, 7 La. 485, this court held that "ships and vessels are indeed susceptible of being mortgaged, but not like immoveable property. The mortgage of ships and vessels, or to speak more correctly, in the language of the Louisiana Code, art. 3272, the *hypothecation* of ships and vessels does not take place, like that of immoveable property and slaves, but according to the laws and usages of commerce. They are not mentioned in that part of the Louisiana Code which treats of legal and judicial mortgages, and not classed with immoveable property and slaves, as being susceptible of mortgage." The same principle

 Clement v. Oakey.

was recognized in the case of *Malcolm et al. v. Schooner Henrietta et al.*, Ib. 488, which was that of a conventional mortgage on a schooner, executed by the owner in favor of a creditor, to secure the payment of a debt, and duly recorded in the mortgage office. We there held that such a mortgage has no effect; and that ships are not subject to the same incumbrances which attach to immoveables, as lands and slaves, situated within the constant operation of the laws of the state. Finally, in the case of *Grant v. Fiol*, 17 La. 158, such a mortgage was declared to be a nullity.*

Judgment affirmed.

ELIZABETH CLEMENT v. SAMUEL WRIGHT OAKEY.

An injunction, and not a rule to show cause, is the proper proceeding to arrest an order of seizure and sale. C. P. 738.

Ground, comprising several squares in the city of New Orleans, was mortgaged to plaintiff, and described in the act according to the plan of the city as it existed at the time. By subsequent proceedings of the municipal authorities, the names of the streets, and numbers and boundaries of the squares were changed, *Held*: that the advertisement of the property to be sold according to the old plan, was no cause to rescind the order of seizure and sale; and that the alterations made by the municipal authorities were matters of public notoriety.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The defendant has taken a devolutive appeal from a judgment discharging a rule to set aside an order of seizure and sale, obtained by the plaintiff on an act of mortgage importing a confession of judgment. The grounds taken were, in substance, that the proceedings subsequent to the issuing of the order, as regards the seizure, notice, and advertisements, were defective and illegal; that since the execution of the mortgage to the plaintiff, which was made according to the old plan of the suburb Annunci-

* See *Hill and another v. Phoenix Tow Boat Company*, ante, p. 35.

ation, the duly constituted authorities of the Second Municipality have changed the arrangement of the property mortgaged, which comprises several squares, altering the names of the streets, the numbers of the squares, and the boundary lines of the squares; and that the mortgaged property cannot be lawfully sold or occupied, used or enjoyed, by any purchaser, except in accordance with the new plan, so lawfully made and adopted.

The rule taken by the defendant in the premises was excepted to, on the ground that the order of seizure and sale could only be stayed by an injunction; that it did not specify the particulars wherein the proceedings were illegal; nor show any sufficient ground to set aside the order of sale.

G. B. Duncan, for the plaintiff.

T. Slidell, for the appellant. The alterations effected by the municipal authorities, are binding on the whole world. To sell according to the old plan, would be injurious to all parties, and tending to the embarrassment of bidders. Would a purchaser be bound, should the sheriff tender him a square different from that described at the sale? Should it be announced at the sale that the description was inconsistent with the actual situation of the property, would purchasers bid as freely, with the prospect of a collision with the public authorities? The proceeding by rule presented a summary mode of testing the truth of defendant's allegations; an injunction would have led to protracted litigation.

MORPHY, J. We cannot say that the judge erred. The Code of Practice points to an injunction as the proper proceeding to arrest the execution of an order of seizure and sale. Art. 738. But admitting that a rule to show cause could be resorted to, no sufficient cause has, in our opinion, been shown to rescind the order of sale. We cannot see that any very serious difficulty could result from selling the mortgaged premises according to the old plan. The changes made by the municipal authorities in the names of the streets, and the numbers and boundary lines of the squares, are, we apprehend, matters of public notoriety; and the purchasers could make no objection on the score of such changes, when, by the description of the property according to the old plan, they were made acquainted with its true extent and situation.

Judgment affirmed.

CORA ANN SLOCUMB and others v. THE REAL ESTATE BANK OF ARKANSAS.

Payment of the price is not essential to the contract of sale. Proof of circumstances calculated to create doubt as to the fairness of the transaction, will not be sufficient to set aside a sale.

Two things are necessary to constitute fraud: the intention to defraud, and actual loss or damage, or such strong probability of it as will induce a court to interfere. Plaintiff attached certain cotton as the property of defendants. Proof that it had been previously sold by defendants to intervenor, who had given a note for the price, which was protested at maturity, and still unpaid. The sheriff's return showed that he had "attached seventy bales of cotton, which was subsequently released on the execution of a bond by the consignees." Urged on behalf of plaintiffs, that though the attachment could not hold the cotton, it was good as to defendants' privilege as vendors. *Held*, that the return showed that no such right had been attached; and that the lien, if any existed, attached to the cotton, which had been sold.

APPEAL from the Commercial Court of New Orleans, *Watts, J. GARLAND, J.* The plaintiffs, holders of a number of the notes of the defendants, amounting to \$3250, presented them for payment in specie at Little Rock, in the state of Arkansas, which being refused, they attached seventy-four bales of cotton in the hands of Frierson, Dale & Co., in New Orleans. The defendants answer that the property seized does not belong to them, but to the intervening party who claims it. That they have never been cited, nor are they in court by the seizure of any property of theirs; and further, they plead a general denial.

John Preston of Arkansas intervened in the suit, and claimed the cotton as his property. To this petition the plaintiffs file a general denial only, and pray that his demand be rejected, and that the cotton be adjudged to be liable for their debt and costs.

The evidence shows that the cotton was purchased of different planters, in the neighborhood of Helena, where there is a branch of the Bank, by the officer of the branch; and that it was afterwards sold by the President, by order of the Directors, to the intervenor, who gave his note for the price, which appears to have been a full one, payable in sixty days. The cotton was delivered to Preston by the Cashier, who put the letter P on it as his mark; and it was shipped by the purchaser, and a bill of lading taken in his own name.

On the part of the plaintiff, it is proved that Preston is a stockholder in the Bank ; that he was formerly its attorney, and is not in the habit of purchasing and shipping cotton. A witness named Payne, says that on the 23d of March, 1841, he was at Helena, and saw 40 or 50 bales of cotton in the yard of the Bank, but that none of it was marked P ; and that he employed a man to inform him when it should be shipped. From the 1st to the 20th of April, 1841, he says that he was at Little Rock, where he met with Harris, who introduced himself to him as the President of the Bank at that place, and told him that he was going to New Orleans to see about the property of the Bank that had been attached by plaintiffs, and he believes by other persons ; and that if he could not get the property released, or make some arrangements that would prevent such attachments in New Orleans, he would be compelled to ship property, and send funds to that city in the name of other persons.

There was a judgment in favor of the plaintiffs for the amount of their debt, and against the intervenor on his claim to the cotton, from which he alone has appealed.

The pleadings in this case present simply the question of title to the cotton. There is no allegation of fraud or simulation in the sale, although the counsel for the plaintiffs has in argument endeavored to establish both. The evidence shows conclusively that there was a sale and delivery of the cotton to Preston, the intervenor, and that it was shipped to the garnishees as his property ; and though Preston does not appear to have yet paid the price, it is not the less a sale, since the payment of the price is not an essential requisite to that contract. The price is secured by a note, and nothing is shown to prevent its collection, at the pleasure of the holder. From the time that the cotton was delivered to him on the bank of the river, and the putting of the initial letter of his name on the bales, it was at his risk ; and had it been lost or destroyed, the loss would have been his, so far as the record presents the case. The fact of Preston being a stockholder in the Bank, and formerly its attorney, and of his not being in the habit of purchasing, may create a doubt on some minds as to the fairness of the transaction ; but that is not a sufficient ground to set aside a sale, as this court has often decided.

The evidence of Payne is in itself so uncertain, and so contradicted by other facts, as to weigh very little on our minds. He was at Helena on the 23d of March, 1841, and saw 40 or 50 bales of cotton in the yard, with a mark altogether different from that on the cotton in controversy. The man he employed does not appear ever to have given him information of the shipment of that cotton. The 74 bales claimed by the intervenor, was shipped on the 3d and 4th of May. Between the 1st and 20th of April, Payne says that he had a conversation with Harris at Little Rock, who was then on his way to New Orleans to see about this case in particular, and some others as he believes, whilst the record shows that the cotton did not leave Helena until the 3d and 4th of May, and this suit was not commenced until the 13th of that month, more than a month after the pretended conversation. These facts, connected with the rather extraordinary manner in which the conversation commenced, and its purport, compel us not to rely much upon the memory of this witness. Independent of there being no allegation of fraud, it appears to us that the plaintiffs have failed to show any, although they have had the benefit of all their own testimony, and also of the depositions taken by the intervenor; nor have they shown that any injury has resulted to them. The Bank clearly had a right to sell its property in Arkansas. It is not alleged nor proved that it is insolvent, any further than its refusal to pay the bills sued on, establishes that fact; nor is it shown that if the defendants were sued at the place of their domicile, the plaintiffs could not recover their money. To constitute fraud, two things are essentially necessary: *first*, the intention to defraud; and *secondly*, actual loss or damage, or such strong probability of it as will induce a court of justice to interfere. 18 La. 388.

The counsel for the plaintiffs contends that though he may not be able to hold the cotton attached or its proceeds, yet that he has a right to the vendor's privilege, which the Bank has on it in consequence of the price not having been paid by Preston. This position seems to us more specious than sound. By reference to the return of the sheriff, it will be seen that no such right was attached;* and had it been, we do not very well see how the plain-

* The sheriff's return is in these words: "Attached in the hands of Frierson, Dale & Co., seventy bales of cotton, marked P."

tiffs could claim it. The lien, if any existed, attached to the cotton which has been sold; the money is in the hands of Preston's commission merchants, and it looks to us like grasping at the shadow after the substance has disappeared.

The judgment of the Commercial Court is, therefore, annulled and reversed, so far as it relates to the intervention of John Preston; and it is ordered that the intervention and claim of John Preston to the seventy-four bales of cotton in controversy, or the proceeds thereof, be sustained, and that the same be paid to him or his assigns, by Frierson, Dale & Co., the holders thereof; the plaintiffs paying the costs of this appeal, and those of the intervention in the inferior court.

Eggleston, for the plaintiffs.

P. Anderson, for the appellant.

LOUIS PILIÉ v. HENRY B. KENNER.

The subpoena for a witness having been returned not executed, plaintiff's attorney made oath that, as soon as he learned that it had not been served, he applied to the landlady in whose house the witness had resided, and was informed that he had left without paying the rent, and that she could not tell where he had gone. *Held*, that the absence of the witness was sufficiently accounted for, and that his testimony taken in another suit might be read on the trial.

Where a witness is illiterate, or his statements appear extraordinary, evidence may be introduced to sustain his testimony, by showing that he made the same statements at the time of the transaction, though no attempt had been made to impeach his evidence or character.

The decision of the lower court as to the admission or rejection of a witness, not introduced at the regular time, will be affirmed, unless the discretion allowed in such cases appears clearly to have been incorrectly exercised.

THIS was an action before the Commercial Court of New Orleans, *Watts, J.*, against the defendant as endorser of a note for \$2550 50 drawn by one Hall. A judgment by default having been confirmed, the defendant appealed, and the case was remanded in December, 1840, on account of illegality in the citation, for further proceedings. See 16 La. 572. On the return of the case the defendant answered, acknowledging his endorsement on the

note, but averring that it had been fraudulently raised from \$250 to the amount sued for. There was a verdict and judgment for the plaintiff, from which the defendant has appealed.

MARTIN, J. This case is before us on three bills of exception. The first is to the admission of the testimony of Fisher, taken in a former case between the present defendant and another plaintiff. The testimony was offered on the production of a subpoena for Fisher not executed, and the affidavit of McHenry, plaintiff's attorney, that after he learned that the subpoena had not been served on Fisher, he applied to Mary C. Quirk, in whose house Fisher last resided, and was informed, that he had left the house without paying the rent, and that she could not tell where he was gone. The reading of the testimony was objected to, on the ground that the absence of Fisher from the court was not sufficiently accounted for; and particular objections were made to the reading of that part of the testimony which related to a conversation between Fisher and Mary C. Quirk. The attorney likewise objected to the examination of Mary C. Quirk as a witness, so far as related to the above conversation, on the ground that it took place in the absence of the defendant; that no part of it was on oath; and that the plaintiff could not discredit Fisher, his own witness, nor support his character or evidence by proving what he said to Mary C. Quirk, especially as neither his evidence nor character were impeached. These objections were overruled, on the ground that the plaintiff might sustain the statement or evidence of Fisher, by showing that he had stated the same to Mary C. Quirk. The court considered the showing sufficient to admit the testimony of Fisher, and that, although it is not usual to attempt to sustain an unimpeached witness, yet when he is illiterate, or his statement extraordinary, that it may be shown that he made the same statement at the time of the transaction.

Another bill of exceptions, is to the rejection of Barringer as a witness. After both parties had closed their testimony the plaintiff proceeded to offer rebutting evidence, when the defendant introduced Barringer as a witness, who was objected to on the ground that it was too late. The objection was sustained, the court being of opinion that the defendant having previously offered a witness for the same purpose, who had been rejected, could

not in a protracted trial, be permitted at such a period to introduce another witness for the object in view, to wit, to prove that on the day of the protest of the note, the defendant did not reside in the house at which the notice was left.

The last bill of exceptions is to the rejection of Williams, a witness offered by the defendant. The court having adjourned after all the evidence had been closed, on the opening of the court on the following day, and before the argument commenced, this witness was offered. The court was of opinion that it was too late, observing that the point as to the regularity of notice of protest was made at the opening of the case; that the case had been before the court during three days; that it was extraordinary that the defendant should rely for proof of his residence, on a colored woman his concubine; and that there were circumstances in the case which indisposed the court to open it, after the *pinch* of the case had been discovered.

Pilié and McHenry, for the plaintiff.

I. W. Smith, for the appellant. 1. The court erred in rejecting the testimony of Barringer and Williams. The testimony of Barringer was offered before the argument had commenced, and defendant had a right to introduce it. In *Buel v. Steamer New York*, 17 La. 544, where the lower court had rejected testimony offered after the parties had closed their evidence, the Supreme Court say, "we think the judge erred. The 484th article of the Code of Practice, says expressly, that it is only *after the argument has commenced* that no witness can be heard without the consent of all parties; and we are unable to discover any reason, why the court *a qua* should have rejected this evidence which was produced *before commencing the argument*, although the parties may have previously said that their evidence was closed." Here neither had stated that his evidence was closed. Why should not testimony be received after the argument has commenced? In *Toulman v. Elliott*, 15 La. 229, this court declared that "the reason of this is clearly to induce parties to present at once all their evidence, by depriving them of the means of eking it out 'by *interrupting the argument* for the introduction of the same or other witnesses, or of documents." In *Richardson v. Debuys and Longer*, 4 Mart. N. S. 130, testimony was received, with the approbation

of this court, after the argument had commenced. In *Dicks v. Cash*, 7 Ib. 363, it was decided that art. 484 of the Code of Practice applied only to trials on the merits; and that on the trial of exceptions a party had the right to adduce new evidence, even after the argument had commenced. From these decisions, we infer, *first*, that the restrictions imposed on the introduction of such testimony is that it shall not interrupt the argument; *second*, that even after the argument has commenced, the judge may, in the exercise of his legal discretion, receive other testimony; *third*, that in this case the testimony does not fall within the exception laid down by the Code of Practice; and that the judge erred in rejecting the offered testimony.

2. The court below erred in rejecting the testimony of Quirk. She testifies to a previous conversation between herself and Fisher in the absence of the defendant. A party cannot support his own witness by proof of his previous statements, when not under oath. *Dismukes et al. v. Musgrove*, 8 Mart. N. S. 375. *Pijeu v. Beard*, Ib. 405. *Perillat v. Peuch*, Ib. 671.

3. The court below erred in receiving the testimony of Fisher. He was present on a former trial. The witness must be present, or his testimony be regularly taken by commission.

MARTIN, J. I. On the first bill, we think the judge did not err. The reading of the testimony was not objected to, on the ground that it was given in a suit between different parties. The inability of the plaintiff to procure the attendance of Fisher, as a witness, after having used all the means in his power, was sufficiently shown; and the reasons which the judge *a quo* gave for the admission of the statement, appear to us cogent.

II. Where a witness is not introduced in the regular order, we always support the decision of the inferior judge, unless the discretion, which he has in such instances, clearly appears to have been incorrectly exercised. There is nothing to induce the belief that it was so in the present case.

III. On the third bill, we do not think that the judge erred; what we have just said applies with equal, and perhaps greater force, to his opinion on the rejection of Williams.

Judgment affirmed.

JOHN TAYLOR and others v. E. WHITTEMORE and others.

The proceeding under sect. 15 of the act of 20 March, 1839, authorizing a plaintiff to propound interrogatories to third persons, touching any property in their possession belonging to the defendant, or any debt which they may owe to the latter, cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived, by such a proceeding, of any advantage or means of defence they would have in a direct action against them.

A contract made in good faith cannot be annulled, though it prove injurious to creditors; nor can a contract, though made in bad faith, be rescinded, unless it operate to their injury. C. C. 1973.

A third person, not a creditor, having advanced money to defendants, at an usurious interest, on certain articles held as security for its re-payment, which advances were applied to the benefit of the creditors of the latter, on a seizure by plaintiffs under an execution against defendants, *Held*: that such third person ought to lose the usurious interest exacted by him; and that the difference between the sum advanced and the real value of the articles, is all that was liable to seizure.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The plaintiffs having recovered a judgment against Whittemore and others, took out process of garnishment, according to the act of 1839, against various persons, and among others, Charles, the appellant in this case, to whom they propounded interrogatories touching any property which he might have received, or taken into possession belonging to the defendants; and interrogated him whether he had purchased any property from them, with an understanding that on the re-payment of the purchase money it should be restored, and whether he had in his possession or under his control any property on which he had loaned or advanced money; and whether he was now, or on any contingency would be indebted to the defendants in any sum.

The garnishee answered: *First*, that at various times previous to the 1st of April, 1841, he had had possession of property and effects belonging to the defendants, as he supposed and believed, which had been returned previously to the 1st of June, 1841, and that at the time of the service of garnishment, he had nothing in his possession or under his control belonging to the defendants. *Secondly*, that since the 9th of April, 1841, he has purchased goods of the defendants, for which he paid in cash at the time of their

delivery, agreeing that they should have the privilege of re-purchasing the same within a fixed period, which time had expired before the service of the notice of seizure ; and that the property thus purchased had become the absolute property of the respondent. The other interrogatories were negatived ; but it is unnecessary to repeat the answers, as the case turns upon those already set forth.

The plaintiffs, thereupon, put in a formal exception to the answers of the garnishee, to wit, that the answers do not state the invoice value of the goods referred to, nor contain any description thereof, nor statement of the time at which they were delivered. The garnishee then filed a supplemental answer, to which he annexed receipts of Whittemore for the price of a number of watches at fifty dollars each ; and he makes oath that he purchased them at a fair price, and that the purchase money was paid in hand ; that most of the watches were second hand and out of order, and that he has disposed of a part of them for a small advance ; and that the balance remain in his possession.

The plaintiffs next filed a paper, in which they take issue on the answer filed by the garnishee. They charge that he does not truly set forth the title by which he acquired, and continues to hold the property in question. They aver that it was put into his possession under a contract of loan, and was intended as a security for a loan of money made by said garnishee, and they deny that there was any legal sale. They charge that the property was deposited with the garnishee at different times, and that corresponding loans were made by the garnishee ; that notes were given by E. and H. Whittemore, or others of the defendants, at the time they received the money, and at a heavy discount. That the notes were received from time to time, and the discount added or paid in cash ; and that the property has never ceased to be that of the defendants.

They, therefore, pray that Charles, the garnishee, be cited and condemned to deliver to the sheriff said property, within ten days. Citation issued to the garnishee, Charles. Without any further answers the cause was tried ; and the court being of opinion that there was no real sale, but a pledge not in legal form, and therefore wholly void, condemned the garnishee to account for the

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watches at the rate of \$50 each, without any allowance for what he had advanced ; and he has appealed.

Hoffman, for the plaintiffs. The testimony proves that there was no sale. The law relative to sales subject to a right of redemption, does not apply to moveable property. See Civ. Code, 3125. *Williams et al. v. Schooner St. Stephens*, 1 Mart. N. S. 417. *Canizo's Syndics v. Cuadra*, 2 La. 459. *Shaw's Syndic v. Newton et al.*, 3 La. 528. The plaintiffs' right to seize is not affected by evidence showing that the advances made by Charles were applied to the use of the creditors.

Kennicott, and *Roselius*, for the appellant.

BULLARD, J. The statute which authorizes this proceeding declares, that the third person cited as garnishee shall be bound to answer in the same manner, and shall be liable in the same manner for his neglect or refusal to answer, and that his answers may be disproved in the same manner as those of garnishees. The Code of Practice, which regulates the proceedings against garnishees, authorizes the answers to be disproved in the same manner as when interrogatories upon facts and articles have been propounded. In the present case something more was done. The plaintiffs have succeeded in annulling a contract between the original defendants and the garnishee, without proving that such contract was injurious to them, as they would have been compelled to do in a direct revocatory action. Under this statute we held, in the case of *Samory v. Hébrard et al.*, that it could not be used as a substitute for a direct revocatory action, the object of which is to test the titles to property in such third persons ; and that by such a proceeding the latter cannot be deprived of any means of defence or advantages which they would have in a direct action brought against them. 17 La. 555.*

The Code has provided ample remedies in all cases where creditors have been defrauded, or injured by the contracts of their debtors ; and the principles which are to guide the courts are laid down clearly. The general principle is announced that contracts made in good faith cannot be annulled, although they prove injurious to the creditors ; and although made in bad faith, that they

* See also *Laville v. Hébrard*, 1 Rob. 435.

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cannot be rescinded, unless they operate to their injury. Civ. C. 1973.

Even admitting that the answers have been disproved, so far as relates to the validity of the garnishee's title to the watches as purchaser, and that they were in truth held as security for money advanced on an usurious contract, it does not follow that Charles ought to lose any thing more than the exorbitant interest which was exacted. The judgment condemns him to lose the whole sum advanced, upon the authority of *Saul v. His Creditors, Astor, intervenor*. The latter had advanced money upon an act of pledge of bank stock. The act was not authentic, and the privilege as pledgee was denied him; but he was allowed to come in as a simple creditor. 5 Mart. N. S. 569. There was, therefore, in our opinion, error in compelling the defendant to account for the watches at the price at which they were received in pawn, without allowing any thing for what had been advanced on them, especially as that advance is shown to have gone to the benefit of the defendants' creditors, and Charles himself is not shown to have been a creditor. At most, the difference between the sum advanced and the real value of the watches, should be held to belong to the defendants, and liable to be seized. This view of the subject renders it useless to examine the bill of exceptions relating to the competency of certain witnesses.

The judgment of the Commercial Court is, therefore, reversed; and it is further decreed that there be judgment for the garnishee as in case of nonsuit, with costs in both courts.*

* *Hoffman*, for a re-hearing. Objections to form must be made in the pleadings. No objection was made to the form of the proceedings in this case by Charles. In the case cited, (*Samory v. Hébrard*,) there was an express exception to the form of the proceeding. The court take for granted, the very question at issue. It requires a resort to an action, only applicable to sales or contracts in fraud of creditors, when the very question at issue is, whether the property came into the possession of Charles under a contract of sale, or of pledge. The evidence shows it was the last. Again, the court says, that Charles was not a creditor. Did not the loan make him one? Where interest is paid on money, is it not paid by the debtor to the creditor? The advances by Charles gave him no privilege against plaintiffs, who acquired a preference by their seizure. Defendants could not have claimed the property, without re-paying the advances made by Charles; *aliter*, as to plaintiffs. C. C. 3125. 2 La. 459. 3 Ib. 528. The deposit with Charles, though intended as a pledge, wants the formali-

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ties required by law to give it effect against third persons. The court erred in deciding that the value of the articles, above the advances, is all that is liable to seizure. In the case cited, (*Saul v. His Creditors*,) the party who had made advances, was only allowed to come in as a simple creditor. No privilege was allowed to him. Such should be the decision here. Charles should be declared a simple creditor; and the privilege allowed him revoked.

Re-hearing refused.

JASPER STRONG v. SOLOMON HIGH.

Where an agent whose duty it was to procure insurance for his principal, neglects to do so, he will be responsible for any loss which may result from his neglect.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Micou*, for the plaintiff. No counsel appeared for the defendant.

GARLAND, J. The plaintiff was owner of three-fifths of the steamer *Columbia*, engaged in the trade between this city and Mobile. The defendant was his special agent and attorney in fact in this city, for the purpose of attending to the business of the boat, collecting the money earned, and doing every thing necessary to the interests of the plaintiff, and for making the business as profitable as it was in his power to do, for which he was to receive a specific compensation. He also had power to sell or mortgage the boat, to appoint officers, &c. He appointed a captain, and acted as agent until the steamer was finally lost. In November, 1836, he effected an insurance on the boat for three months. In March following, the policy was renewed for the same space of time, and again on the 3d of June, 1837, for three months. The last policy was made at the instance of *Leverich*, who was the general agent of the plaintiff in other matters; and the defendant promised that he would continue it, and deposit the policy with *Leverich*, who had, on the faith of that promise, become security for the plaintiff for a considerable sum; and the policy was to have been left with him as an indemnity in case of loss, or damage resulting from the suretyship.

The defendant neglected to renew the policy on the 3d of September, 1837, and on the 6th of October following, the boat was

lost in a storm on Lake Ponchartrain. This suit is to recover the value of three-fifths of the steamer. The plaintiff had a judgment for \$6840, and the defendant has appealed.

The Civ. Code, arts. 2971 and 2972, makes an agent an attorney in fact responsible to his principal for his fault, neglect, or unfaithful management. Story on Agency, 212, says, "if an agent, who is bound to procure insurance for his principal, neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence." So if he procure an insurance from underwriters notoriously in bad credit, or insolvent, and a loss occur. This court, in 6 La. 583, held, where a mercantile firm was part owner of a steamboat, and acted as agent for a co-proprietor at a distance to insure his interest therein, and afterwards discontinued such insurance without instructions from or notice to him, and the boat was lost, that the agents would be liable for the uninsured interest. In 6 Mart. 653, is a case equally strong.

From the contract with Leverich, the defendant seems to have been sensible of his duty or obligation to keep the boat insured; and his conversation with that gentleman, soon after the loss, goes to confirm this opinion. His remark, that he would have sworn the boat was insured, proves that he was sensible that he ought to have had it done. When High insured the boat in November, 1836, three days after the plaintiff purchased her, it is to be presumed that it was done by the orders of, or with the consent of the plaintiff. His renewal of the policy afterwards, proves that he knew it was his duty to do so; and having since neglected to comply with it, he must be held responsible.

Judgment affirmed.

JEDEDIAH LEEDS v. A. V. BREDALL and others.

Where no place is designated for the delivery of articles ordered of a manufacturer, delivery is to be made at the place where they are manufactured.

APPEAL from the District Court of the First Judicial District,
Buchanan, J.

Sterrett, for the plaintiff.

G. B. Duncan, for the appellants.

MORPHY, J. The petitioner seeks to recover \$2650 29, being the value of two pumps with their machinery and apparatus, as detailed in an account annexed to his petition. The work was executed at the plaintiff's foundry for Bredall, and his co-defendants, Godfrey Blossman & Co., engaged to pay for it in the following terms :

"Please let the bearer, Captain Bredall, have the two iron pumps spoken for, and we will hold ourselves responsible for the payment for them, when delivered.

"GODFREY BLOSSMAN & Co."

There is no dispute as to the manner in which the work was done, nor as to the amount demanded for it ; but it is urged by Godfrey Blossman & Co., who alone have appealed from the judgment rendered below in favor of the plaintiff, that the two pumps were not delivered to Bredall, and that they cannot be made responsible until such delivery takes place. The evidence shows that when the pumps were finished, they were examined by a person appointed by Captain Bredall, who then took away one half of the machinery ; and that the balance of the work has since remained at the foundry at the disposal of Bredall, who never called for it. The testimony further shows, that when the work had been approved of, and a part of it taken away, Godfrey Blossman & Co. gave in part payment of it \$1300. Under such circumstances, it appears to us that Bredall's neglect to take away the remainder of the machinery cannot justify the refusal of Blossman & Co. to pay the balance of the plaintiff's bill. The delivery has been effected as far as the plaintiff could make it. There being no place designated for this delivery, it was to be made at the foundry where the pumps were made, and where

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the plaintiff had his domicil. Civ. Code. art. 2153. It must be considered to have been made as soon as the works were examined, found satisfactory, and put at the disposal of Bredall, who was to have removed them at his own expense. Civ. Code, arts. 2459, 2460, 2527.

The judgment of the court below is, however, erroneous, inasmuch as it allows to the plaintiff the whole amount of the account sued on, when the testimony shows that a sum of \$1300 has been paid on it.

It is therefore ordered that the judgment of the District Court be reversed, and that the plaintiff recover of the defendants, Godfrey Blossman & Co., the sum of \$1350 29, with costs below; those of this appeal to be borne by the plaintiff and appellee.

WILLIAM T. RAYNAL and others v. ENEAS SMITH and another.

APPEAL from the Commercial Court of New Orleans, *Watts, J. G. Strawbridge*, for the appellants.

T. Slidell, for the intervenors.

MARTIN, J. Both parties are appellants from a judgment by which Haggerty and Morgan, intervenors in this case, have recovered the sum of twenty-nine hundred dollars and the costs, out of the proceeds of the steamer *Columbia*.

These intervenors sold the steamer to James Reed, agent of several persons who intended to run her between New Orleans and some of the ports of the republic of Texas, retaining an interest of three-tenths of the boat. The price was fifty thousand dollars; thirty-five thousand of which were to be paid by the vendees, partly in cash and partly in their notes. It was agreed that the nett proceeds of each trip should be applied to the discharge of the notes before their maturity, with an allowance on the sums thus paid, in advance of interest, at seven per cent from the payment to the maturity; and that the intervenors should be farther entitled to receive out of the nett proceeds of the steamer, after the price of the sale was paid, the sum of three thousand dollars, without any personal

responsibility of the vendees therefor, on account of some expenses the intervenors were to be at in fitting out the steamer for New Orleans, the bargain having been effected in New York.

The steamer was employed in the intended trade, until her earnings discharged the notes given for the credit part of the price. The agency of James Reed was transferred by the plaintiffs to the defendants at this period, when the liabilities of the boat were about five thousand dollars, exclusive of a debt of about seven thousand five hundred dollars, for new boilers which had been ordered. Soon after this a misunderstanding between the parties rendered a settlement of their concerns necessary, and the present suit was instituted. The boat was sequestered, bonded by the defendants, who kept her in the Texas trade, until she was sold under an order of court entered into by consent. She produced about twenty thousand dollars. The intervenors now came in and urged their claim for the final sum of \$3000, which it was stipulated should be paid to them out of the nett profits of the steamer. To this claim, two specific objections have been insisted on before us. The principal objection is, that the boat had not made such earnings, as were contemplated by the contract to entitle the intervenors to this extra allowance. The interpretation which the judge below gave to the clause under which the claim is urged, was, that if after the expiration of the credit given for the payment of the residue of the purchase money, and while the boat belonged to the association, she had made a sufficient sum in earnings to pay this extra allowance, the intervenors would have been entitled to receive it. At the time when the agency was changed, the earnings of the boat had discharged, or nearly so, the credit part of the price, to wit, the sum of \$26,250. The steamer was, however, under liabilities to the amount of \$12,500, which appear to have been since reduced to \$9000. The judge concluded that her sale left a profit of about \$10,000, out of which the plaintiffs' claim ought to be satisfied. It does not appear to us that he erred.

It has, however, been contended, that the steamer was not delivered to the vendees in as complete order as the intervenors had engaged to put her in, some articles of her tackle and apparel

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having been deficient. For this a deduction of one hundred dollars was made, and is justified by the testimony on record.

Judgment affirmed.

SUCCESSION OF NICOLAS GIROD—PIERRE SYLVESTRE BIRON,
Appellant.

APPEAL by Pierre Sylvestre Biron, from a judgment of the Court of Probates for the parish of Orleans, *Bermudez, J.*

Biron, pro se. No counsel appeared for the curator.

BULLARD, J. The appellant opposed the tableau filed by the curator in this case, on the ground that the fee allowed to him as one of the attorneys of the curator, to wit, \$1500, was not adequate for the services rendered by him. He alleges that he was entitled to \$4000. His opposition was overruled, and he has appealed. He has failed to satisfy us that injustice was done him, and the adverse party has not demanded that his fee should be reduced. The argument that the appellant was not allowed a fee equal to that of the attorney of the absent heirs, that is \$4000, does not appear to us very cogent. In order to make such an argument logical, two things should be shown: *first*, that the attorney of the absent heirs was justly entitled to that sum; and *secondly*, that the services rendered by the appellant were equally useful to the estate. Neither is shown to our satisfaction.

Judgment affirmed.

SAMUEL TAYLOR HOBSON and others v. JOHN DAVEY BEIN.

Execution having been issued against defendant in an action on a note secured by mortgage, the proceedings were enjoined by a third person, the real owner of the mortgaged property, and the real debtor of the amount of the note; and a judgment was entered by consent, recognizing the property as belonging to the intervenor, and ordering its sale. The sale made in pursuance of this judgment having been set aside for irregularity, plaintiffs took a rule on intervenor to show cause why a *pluries fi. fa.* should not be issued. On an answer by the latter alleging the illegality of the judgment, and denying plaintiffs' right to proceed in the manner adopted by them, and praying for a trial by jury: *Held*, that the rule presented no issue or question of fact for a trial by jury, and that such trial was correctly refused.

On a motion to dissolve an injunction, on the ground of illegality apparent on the face of the petition, no evidence can be introduced, except as to the question of damages.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiffs.

Mitchell, for the appellant.

MORPHY, J. The defendant being sued as drawer of a promissory note for \$7000, secured by mortgage on a piece of property situated at the corner of Custom House and Burgundy streets, confessed a judgment, on which execution was issued. The appellant, Mary Connellin, enjoined the sale, averring in substance that she was the true owner of the property about to be sold, having purchased it from John Hagan, jr. for the sum of \$14,000, at a credit of 12 and 24 months; that when about to pass the sale, she was advised to place the property in the name of the defendant, who, on that account, subscribed two notes for \$7000 each, to the order of Richard Bein, who endorsed them according to the terms of the sale, but that as the property was in reality purchased by her, it was well understood that those notes were, to all intents and purposes, her obligations, and that she was bound to provide for them at maturity. She alleged that these facts were within the knowledge of the plaintiffs, who treated with her as the owner of the property, and received various payments on the note, which should have been credited thereon. She averred that the confession of judgment made by Bein is null and void, so far as it gives any lien and privilege on the property, having been

made without her knowledge and consent. On the 9th of July, 1839, a judgment was entered by consent between the attorneys of the plaintiffs and defendant, and G. B. Duncan, the counsel of Mary Connellin, recognizing the property as belonging to the latter, as set forth in her petition for an injunction, and ordering it to be sold on the 5th of December following, or at any time thereafter that might be agreed upon by the parties, for what it would bring, on the following terms, to wit, one-fifth cash, and the balance at 12, 18, and 24 months credit, for approved notes, secured by mortgage on the property until final payment; and decreeing that the proceeds be brought into court, and applied to the payment of the debt due on the property, the surplus, if any, to be paid to Mary Connellin. Under this judgment, the property was sold, and bought by Richard Richardson, the transferee of the judgment of the plaintiffs. A monition having been taken out by the purchaser, Mary Connellin made opposition thereto, alleging that she was the owner of the property described in the monition; that no judgment had been rendered under which execution could be issued so as to be binding on her; that her attorney, G. B. Duncan, had greatly exceeded his powers; and that the agreement entered into by him was null and void, so far as she was concerned. She set forth various other grounds, which it is useless to mention, as her opposition was sustained, with the consent of the plaintiffs' counsel, as to her prayer for rescinding the sale. The Judge accordingly set aside the sale which had been made, but decided on the first ground in relation to which his opinion was asked, that the agreement entered into by G. B. Duncan, of which she had complained, was in no respect a confession of judgment against her; that he had, on the contrary, obtained for her all that was demanded in her petition; and that if there had been any confession of judgment, it came rather from the counsel of the plaintiff and defendant. He further decided, that so far as the agreement regulated the terms of the sale, it had been adopted by her on the day it was made, and had been, on other occasions, ratified. Things being in this situation, the plaintiffs took a rule on Mary Connellin, to show cause why a *pluries fi. fa.* should not issue under the judgment of the 9th of July, 1839, and why the property specially mortgaged should not be sold for whatever

it would bring, without appraisement, and on the terms specified in said judgment. In a written answer to this rule, Mary Connellin showed for cause, that the judgment or decree was illegal, so far as her rights were concerned; that the plaintiffs had not the privilege of vendors, and were not authorized nor entitled to proceed in this manner against her; and she prayed for a trial by jury. The Judge below refused a trial by jury; heard the parties; and made the rule absolute. After an ineffectual attempt to obtain a suspensive appeal from this order or judgment of the court, Mary Connellin sued out an injunction to arrest the execution of the writ of *pluries fi. fa.*, which had issued in the meantime. After stating the proceedings had in relation to the rule taken for a *pluries fi. fa.*, she averred that the decision upon the rule, thus made to operate as a final judgment, or, at any rate, as a judgment causing her an irreparable injury, was neither signed nor notified to her; and that, in violation of the law and of her rights, the plaintiffs have taken out a writ of execution, which illegal proceedings, she fears, will be carried into effect by the sheriff to her great damage and injury, unless restrained by the interference of the court. On a motion to dissolve the injunction on the face of the papers, the Judge, after hearing the parties, ordered that the injunction should be dissolved, and that Hobson & Co. should recover of Mary Connellin, and her surety in the injunction bond, damages at the rate of ten per cent on \$7000, to be computed from the 26th of April, 1841, to the date at which the sale thus enjoined should take place, as also \$250 special damages. It is from this judgment that the present appeal has been taken.

The only reason we find given by the Judge in support of the judgment appealed from, is, that there "were no merits in the petition for the injunction." A better one could not, perhaps, be assigned on a motion to dissolve on the face of the papers. In search of some just cause of complaint on the part of the appellant, we have vainly looked not only to her petition for an injunction, but throughout the record. The main ground of her first opposition to the sale, was her right to the property bought in the name of the defendant. Her ownership, which was recognized

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as soon as asserted, could not affect or change the rights of Hobson & Co. as holders of one of the notes given for the price. They might have proceeded under their judgment against Bein, and have sold the property in due course of law. Instead of doing this, they made an arrangement with her counsel, by which the sale was postponed to the next season, and agreed to be made on the most liberal terms; and she expressed her entire concurrence in this agreement. All the subsequent oppositions and proceedings of the appellant we cannot but consider as intended to delay the sale of the property, of which she has now been in possession since the 1st of June, 1836, when it was purchased for her in the name of the defendant.

The Judge correctly refused a trial by jury on the rule taken by plaintiffs in relation to the issuing of a *pluries fi. fa.* It presented no issue or matter of fact proper to be laid before a jury; nor did he err in refusing to receive evidence on the trial of the motion made by plaintiffs to dissolve the injunction on the face of the papers. The appellees have prayed for damages for a frivolous appeal. We do not allow any, as the party has been already mulct in heavy damages on the injunction bond.

Judgment affirmed.

WILLIAM F. MURDOCK and others v. THE UNION BANK OF
LOUISIANA.

A bank will be responsible for the amount of a note issued by it, on proof of its loss and of the contents of the note. So, on the production of the half of a note, where the absence of the other half is fairly accounted for, the bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half.

The half of a bank note, cut in two, is not negotiable. The negotiability of the note can only be restored by re-uniting the parts.

In an action by the holder of the half of a bank note, where the half on which the president's signature is usually affixed has been lost, the signature of the president need not be proved. It will not be presumed that notes were ever issued without the signature of that officer.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Wharton*, for the plaintiffs.

Denis, for the appellants.

GARLAND, J. On the 6th of March, 1841, the plaintiffs, by their clerk or agent, deposited in the post office in Baltimore, a letter written by them, addressed to Benjamin Story in New Orleans, which contained the right hand halves of the following notes of the defendants: No. 366, \$50; No. 394, A. \$100; No. 1898, A. \$100; No. 2218, A. 100; No. 301, A. \$100; also the halves of various notes of other banks, and a bill of exchange. This letter never reached its place of destination, and it is in evidence that the mail which was made up in Baltimore on the 6th of March, 1841, for New Orleans, never reached this city. The loss of this letter, and a statement of its contents, were advertised for one month in a newspaper published in New Orleans, but nothing was ever heard of it. Story testifies that the left hand halves of the notes filed with the petition, were received by him in a letter from New York, with instructions to hold them for the plaintiffs who reside in Baltimore. These left hand halves are signed by J. B. Perrault, Cashier. His signature is admitted to be genuine; and it is admitted that he was the cashier of the defendants, at the date of the notes. These halves are No. 2218, A. \$100; No. 1898, A. \$100; A. \$100, the No. so blotted or erased as not to be visible; No. 394, A. \$100; No. 366, \$50. From what is visible in English and French, on the face of the halves of four of the notes, it is palpable that the Union Bank of Louisiana promise to pay A. C. Tremoulet, or bearer, the sum of one hundred dollars on each note. On the note purporting to be for fifty dollars, every thing necessary to make out the promise to pay A. C. Tremoulet, or bearer, that sum, is apparent, except the word *dollars*. The half notes were presented to the Bank for payment, and an offer made of a bond with good security to protect it from damage, or danger of re-payment, in case the moieties lost should ever be presented for payment. The President refused to pay more than half the amount of the notes, to wit, \$225. This was refused.

On the part of the defendants it was shown, that some of the notes of the Bank have two numbers, one on the right and the

other on the left, which it is often difficult to distinguish, in consequence of the ink being effaced by frequent handling. The notes of one hundred, and of fifty dollars, have generally the number on each end, but only one letter on the left hand side. The issues are always made in series of the letters A and B, and frequently of the letters A, B, C, D, each of the series having the same numbers. The numbers of the notes of each denomination are not continued. There are notes of the same letter and number, which can only be distinguished by the date of the issue, which is to be found on the right hand of the note. It is impossible to identify two separate halves, as being halves of the same note. The Cashier of the Bank puts a case to illustrate the idea he wishes to impress on the court. He says, "suppose that the left hand half of the note with the signature of the Cashier, being A No. 1, was paid for the full amount of the whole note, and that afterwards the right hand half, with the signature of the President, and likewise with the No. 1, but without the letter, was presented for payment; it could not be proved that this half was part of the note already paid, there being nothing to show to what series, whether A, B, C, or D, it belonged, nor whether the half note paid was of the same issue." In paying the notes, the signatures are the principal guide, the numbers being frequently erased.

These are the facts of the case. The defendants pleaded a general denial, and further averred that if all the allegations in the petition were true, the plaintiffs could not recover. There was a judgment for the amount claimed, with costs, directing the plaintiffs to give bond and security in the sum of one thousand dollars, to save the defendants harmless from any demand of payment on the halves of the notes alleged to have been lost, and from any loss or damage that may accrue from their non-production in court. From this judgment the defendants have appealed.

The defendants contend that they are not bound to pay any thing, unless the whole note be produced. They say that a corporation can only be bound by the acts of its agents; that these agents in the present case, are the President and Cashier; and that no note or obligation is binding upon the corporate body, unless it bears the signature of both these officers.

As a general principle of law, it is well settled that one does

not lose his right to real or personal property, or to a debt, by losing the evidence of it. If the whole note of a bank were lost, and its contents could be established by evidence, we believe that the amount could be recovered, as in the case of the note of an individual. If half of the note be produced, and its mutilated appearance fairly accounted for, we are also of opinion, that the bank is bound to pay the note in full. In the case of *Bullit v. The Bank of Pennsylvania*, 2 Wash. C. C. R. 172, it was held, that if a bank note be divided, and half of it lost, the *bona fide* holder of the half which is produced, is entitled to payment of its amount, on proving the loss of the other part, and accounting for the mutilated appearance of that which is produced; and that the holder of the part which was lost or stolen, which may afterwards be found, will take it from the finder or the robber, subject to every defence, which could have been legally made against the finder or robber. The facts of the case are very similar to the one under consideration.

In the case of *Martin v The Bank of the United States*, it was held, that where the holder of a bank note cuts it in half, for the purpose of more safely transmitting it, and one of the halves is lost, but the other arrives at its destination, he may recover the whole amount, and this though the note was cut after notice from the bank that, after a certain day, when their notes were voluntarily cut into parts, they would not pay them, unless all the parts were produced, which was known to the party prior to his cutting the note in question. Coxe's Dig. 81.

In the cases of *Ward v. The Bank of Virginia*, 6 Munford's Rep. 166, and of *Reynolds v. The Farmers' Bank of Virginia*, 4 Randolph, 186, it was decided, that where a bank note was cut into two parts, and one half was sent by mail and lost, the holder of the remaining half had a right to demand payment at the bank, upon the presentation of the half in his possession, by proving ownership, and giving adequate security for the indemnification of the bank, in case the lost halves should ever be presented.

In the case of *Patton v. The State Bank of South Carolina*, 2 Nott & McCord's Rep. 464, the same doctrine is recognized. In 1 Mart. 12, Judges Matthews and Lewis held, that a bank was bound to pay a note from which the signatures of both Cashier and

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President had been torn, it being proved from the number, letter, and name of the payee that the note was genuine, and that a note of a similar number and letter had been put in circulation .

It is shown, in this case, that the halves of the notes produced belong to the plaintiffs. The halves lost also belonged to them. By reference to the list of the notes set forth in the deposition of the witness in Baltimore, it will be seen that the lost halves are of precisely the same numbers and letter, and for the same sums as those produced. The signature of the Cashier is admitted to be genuine, and there is no question of the genuineness of the notes, so far as the halves can exhibit the fact. The amount for which each note is given, can be plainly seen on the face of the half note. The loss of the right hand halves of the notes is satisfactorily shown. They were duly advertised in conformity with article 2259 of the Code, and have never been seen or heard of since they were deposited in the post office in Baltimore. A bond, with ample security, has been given to indemnify the defendants against any loss that may be sustained in case the lost halves of the notes shall ever be produced.

The objection founded on the case or supposition put by the Cashier, appears to us more applicable to the halves of the notes lost, in the hands of the finder or holder, than to those in the hands of the plaintiffs. They produce the halves under circumstances not at all suspicious. They are the owners, and account for the mutilation of the notes in a reasonable manner. By cutting the notes in two, their negotiability was destroyed until re-united, and it would be almost impossible for the finder of the lost halves to recover on them. If he did, it would be by making it appear that they were the halves of some other notes than those sued on, and such a result could be produced in no other way, than from the confusion which might arise from the Bank having issued two notes of the same letter and number, and from its relying on the date alone to distinguish the series. This is their own fault, and should not prejudice the plaintiffs.

As to the objection, that there is no evidence of the lost halves having been signed by the President of the Bank, we think that although the witness does not say that they were actually signed

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by him, there is sufficient evidence to induce a strong belief that they were so signed. The witness speaks of the halves of the notes of the defendants. The halves produced are no doubt parts of genuine notes. It is not to be presumed that the Bank ever issued notes without the signature of the President. Nothing has been alleged or proved to raise a suspicion that any notes, not signed by the President, have ever been stolen from the Bank or lost, or that any such notes have ever got into circulation. The probability of any serious loss accruing to the institution by an affirmance of the judgment, is too distant to justify the discharge of the defendants.

Judgment affirmed.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE
UNITED STATES v. JOHN AMI MERLE and others.

Notice of protest, left with a black servant, in the office of the person notified, is sufficient.

Notice of protest need not be sent by the mail which leaves on the day of the protest; but it must be deposited in the post office in time to go by the first mail of the succeeding day.

Interest will be allowed on the amount of the damages on protested bills or notes.

APPEAL from the Commercial Court of New Orleans, *Watts, J. T. Slidell*, for the plaintiffs.

F. B. Conrad, for the appellant.

GARLAND, J. This is an action on three bills of exchange, amounting to \$35,000, drawn by John A. Merle & Co., in favor of Alexander Caldwell, in the year 1837, on Howard & Merry of Boston, which were accepted, and protested for non-payment.

The plaintiffs claim the amount of the bills, with ten per cent damages, the costs of protest, and interest. The answer is a general denial on the part of the drawers and endorsers. The Commercial Court gave a judgment in favor of the plaintiffs, from which the defendant, Caldwell, has appealed. He is the endorser, admits his signature, and bases his hope of relief at our hands on the insufficiency of the notice of protest.

One bill for \$15,000 fell due on the 20th of May, 1837. It was protested on that day, and a notice deposited in the post office in Boston, directed to the agent of the Bank in New Orleans. The mail of the 20th of May from Boston arrived in New Orleans on the 5th of June following, and on the same day a notice was left in Caldwell's house. It was handed to a black female servant, in the office of the defendant, Caldwell, who said that he was not then at home.

Another bill for \$10,000 became due on the 12th of June, 1837. It was protested on the same day, and a notice deposited in the post office in Boston, directed to the agent of the Bank in New Orleans. The mail of the 12th of June arrived in the latter city on the 28th of the same month, and on that day a notice to Caldwell, the endorser, was served in the same manner as the one of the 5th of June, before stated.

The third bill for \$10,000 fell due on the 12th of July, 1837. It was also protested, and a notice deposited on the same day in the post office in Boston, directed as the other notices. The mail of the 12th of July arrived in New Orleans on the 27th of the same month, and that of the 13th on the 29th. On the latter day, a notice was handed to Caldwell, the endorser, in person.

It is urged by the counsel for Caldwell, that the service of the notices is not sufficient to bind him, as they were handed to a slave at his house and office, which were in the same building; and he relies upon the decision of this court in the case of *Dufour v. Morse et al.*, 9 La. 333, to sustain him. There is a marked distinction between that case and the present. The evidence in that case was, that the notary's clerk went early in the morning to the defendant's house to deliver the notice. It was closed, the family not having risen from bed. He found a black man standing before the door, at which he had knocked several times, who seemed to be a servant of the house, who informed him that the white people were asleep, whereupon the clerk gave the notice to the man, requesting him to give it to the defendants, or one of them. On the part of the defendants, it was proved that there was not at the time a black servant in the house. The court very properly held that this was not a sufficient service of notice. The black man was not in the house, but in the street. It was proved that

he was not a servant belonging to, nor in the employment of the family ; and the probability is, that he was a loiterer, whose attention was attracted by so early a visitor, and who, finding the repeated knocks of the clerk at the door not heeded, reasonably concluded that the family were asleep, and so stated. The ground of the decision was, that the notice was not left in the house, nor with a person in the house, but given to one in the street, not shown to be in any manner connected with the family.

In this case, the appellant's counsel admits that if the notice had been laid on the appellant's table or desk in his house or office, or slipped under the door, if closed, it would have been sufficient to bind him ; but contends that as it was delivered to a black servant, presumed to have been a slave, in the house and office, it is insufficient. We do not think so. We cannot see the force of an argument which admits that if a notice be left on an inanimate object, it will be good, but if left with a human being possessed of senses and faculties, it is bad, merely because that being cannot exercise all the civil rights of a white person. The counsel, for the purpose of illustrating his argument, puts extreme cases, which proves that the position assumed is an extreme one. We are of opinion that the notices are sufficient, and that the defendant, Caldwell, must be bound by his endorsements.

For the bill falling due on the 12th of July, 1837, the defendant, Caldwell, says that he is not liable, as it is shown the mail of that day arrived in New Orleans on the 27th of the month, while the notice was not served until the 29th. The evidence shows that a mail for the South was accustomed to leave Boston in the morning, and again at six o'clock P. M. As the notary says that he put the notice in the post office on the 12th of the month, the defendant assumes that it was in time for the six o'clock mail, and consequently arrived here on the 27th, and that not having been served on that day or the next, he is discharged. It does not follow from the statement of the notary, that the notice was put in the office in time for the six o'clock mail. It was not necessary that it should have been, and the probability is it was not ; but that it was put in the post office late on the evening of the 12th, so as to go by the mail of the following morning. It is well settled, that if a bill be protested on a particular day, the holder or

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notary is not bound to send the notice on that day, although a mail may leave the place, but that he is bound to deposit it in the post office in time to go by the first mail of the day following. It is shown that this was done in the present case, and we are of opinion that the defendant Caldwell is bound by it. 1 La. 122. Chitty on Bills, 513, 514.

The counsel of the appellant urges that the judgment must be reversed, because interest has been allowed on the damages which the plaintiffs are entitled to recover. This court held differently in *Robert, &c. v. The Commercial Bank*, 13 La. 528.

Judgment affirmed.

JOHN CHRISTOPHER WAGNER and another v. HENRY B. KENNER.

A note dated the thirty-first of September, will be considered as having been made on the thirtieth of that month; and where such a note was payable at six months, it will be due on the 30th March, and must be protested on the second of April following. The computation of the time of maturity of a bill or note, payable one or more months from date, must be made according to the Gregorian calendar, i. e. from the day of the month on which it bears date to the corresponding day of the month of its maturity, without reference to the number of days in the months, and such has been the custom in this city. Thus a note drawn on the 28th, 29th, 30th, or 31st of January, payable one month from date, will be due on the 28th of February, if the year be not bissextile, because the month of February has no other corresponding day; but a like note dated the 28th or 29th of February, will be due on the 28th or 29th of March. Such a note drawn on the 31st March, will be due the 30th of April; but if dated on the 30th of April, it will be due on the 30th, not the 31st of May.

Art. 2055 of the Civil Code, which provides that, "where the term referred to in a contract, consists of one or more months, the parties, if they have not made any other explanation, shall be deemed to have meant months in the order in which they stand in the calendar after the date of the obligation, and with the number of days, such months respectively have," does not apply to bills of exchange or promissory notes. The laws of Spain were not abrogated by the transfer of the territory of Orleans to the United States, but the commercial law of the latter became, by that transfer, the law of the territory of Orleans.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN, J. The defendant, sued as endorser of a promissory note, is appellant from a judgment against him. His counsel has contended that the protest was not timely made, and this is the

only question upon which the parties have placed the case before us.

The note bears date the 31st of September, 1839, and was payable six months after date. It was protested on the 3d of April, 1840.

McHenry, for the plaintiffs. 1. A date is not necessary to the validity of a note. An impossible date, as the 31 September, is no date. A note, not dated, must be considered as bearing date from the day on which it was really made or delivered. *Goddard's case*, 2 Coke's Rep. 5. *Lansing v. Ten Eyck*, 2 Johns. 203. *Armitt v. Breame*, 2 Lord Raymond, 1079. Chitty on Bills, 59. 2. In computing the maturity of bills or notes, calendar not lunar months must be reckoned. A note drawn on the 30th of September, at six months, must be protested on the 3d of April, following. See Civ. Code, art. 2055. Chitty on Bills, 159, 267. *Lef-fingwell, &c. v. White*, Johnson's Cases, 100. *Putnam et al. v. Sullivan et al.*, 4 Mass., 53. *Williams v. Matthews*, 3 Cowen, 252.

I. W. Smith, for the appellant. 1. A note bearing an impossible date has no date; and in such a case the party suing on it must prove when it was put in circulation, and the record contains no such evidence. 2. The note was not protested on the proper day. There is no day in the year on which a note can be drawn payable in six months, so that the last day of grace shall fall on the third of April. If drawn on the first of October, it will fall due on the first and fourth of April. If drawn on the 30th September, it will become due on the 30th March and 2d April. 2 Pardessus, Cours de Droit Commercial, part 2, tit. 1, ch. 1, § 1, p. 66. Armand Dalloz, Dictionnaire de Jurisprudence, title, Effets de Commerce, § 337. 6 Dalloz, Recueil Alphabetique, p. 623, 626-9, title, Effets de Commerce. Sirey, Jurisprudence de la Cour de Cassation, year 1817, part 1, p. 382, 3. Ib. year 1818, part 1, p. 187-9. Ib. year 1819, part 1, p. 237, 8. 3 Favard de Langlade, page 266, 7. Nougier, Des Lettres de Change, No. 25, p. 22. 2 Horson, Questions, p. 29-47. Rogron, Code de Commerce, p. 131. 4 Petersdorff's Abridgment, p. 425, and notes. Kyd on Bills, p. 5. Foster on Bills of Exchange, ch. 7, p. 33 to 37.

MARTIN, J. The counsel for the appellees has contended that the question was correctly solved, under a provision of the Code of Louisiana, art. 2055, which is in the following words: "Where the term referred to by the contract, consists of one or more months, the parties, if they have not made any other explanation, shall be deemed to have meant months, in the order in which they stand in the calendar, after the date of the obligation, and with the number of days such months respectively have." He has urged that there being no such day in the calendar as the 31st of September, we must consider the word, 31st, as not having been written, and the note as bearing date in the month of September generally; and that we must adopt the conclusion most favorable to the defendant, to wit, that the note was made on the last day of the month. *In dubiis, semper quod minimum est sequimur*. In cases of doubt, the conclusion must be *in favorem solutionis*—the obligation must be taken in the sense the least onerous to the obligor. Assuming then that the note bears date the last day of September, and it being payable six months after date, the counsel has contended that the drawer was entitled to the following six calendar months; that the note did not become payable until the last day of these months, to wit, the 31st of March; and that the 3d of April was the last of the days of grace, on which the protest should have been made, and on which it was made accordingly.

The counsel for the appellant has contended that all commercial questions were not intended to be regulated by the Code of Louisiana. That the legislature intended to prepare a Code of Commerce, which should contain the principles according to which such questions should be solved. That they appointed juriconsults who prepared such a Code; and that we have it in print, though it has never received the sanction of the legislature. The Superior Court of the late territory of Orleans, very early held that although the laws of Spain were not abrogated by the taking possession of the country by the United States, yet that, from that event, the commercial law of the nation became the commercial law of New Orleans; and this court has frequently recognized the correctness of these early decisions, principally in cases of bills of exchange, promissory notes, and insurances.

Accordingly, it is urged, that the holders of the note cannot re-

cover, as the protest was not made in due time ; and that it should have been made on the 2d day of April. The counsel for the appellant relies on Kyd on Bills, p. 5. Petersdorff's Abridgment, vol. 4, p. 425, and Foster on Bills of Exchange, chap. 7, p. 33. He introduced the officers of most of the banks in this city, and a number of notaries, all of whom joined in deposing that a note like that under consideration, bearing date the 30th of September, and payable six months after date, ought to be protested on the 2d of April following ; and that this has been the universal practice of all the banks in this city, from the establishment of these monetary institutions. Such too, is the practice in France. Dalloz, Jurisprudence Générale, vol. 6, sec. 4, in the title Effets de Commerce, lays down the general principle thus : The computation of bills or notes drawn one or more months from date is made according to the Gregorian calendar, that is to say, from the day of the month it bears date, to the corresponding day of the month of its maturity, without any attention to long and short months. For instance, a note drawn on the 28th, 29th, 30th or 31st of January, and due a month from date, will be due on the 28th of February, if the year be not bissextile, because the month of February has no other corresponding day ; those drawn on the 28th or 29th of February and due one month from date, will be due on the 28th or 29th of March, because the corresponding days are found in the month of March. A bill drawn the 31st of March, and due one month from date, will be due on the 30th of April ; and, on the other hand, one drawn on the 30th of April will be payable on the 30th of May, and not the 31st.

This mode of calculation facilitates greatly the ascertaining of the day of the protest, and the computation of interest. It is extremely simple. The mode pointed out in the Code of Louisiana, would perhaps be without objection, if notes were always drawn on the last day of the month, for then they would always become due on the same day of the month of the maturity ; but if a note were, *e. g.*, dated the 16th day of January, and payable one month after date, that month would not be a calendar month, but be composed of two halves of calendar months, to wit, the fifteen remaining days in January constituting one half of that month, and the first fourteen days of the next, so that it would become due in

29 days, to wit, on the 14th of February. The computation contended for by the appellant, is the only one which affords a general rule without any exceptions. It is moreover recommended by universal practice in this city, and I believe throughout the United States. We understand that the case has been placed before us, on authorities which were not laid before the first judge.

A majority of the court concurring in this opinion, it is, therefore, ordered, that the judgment of the lower court be reversed, and that there be judgment for the defendant, with costs in both courts.

MORPHY, J. I have read the opinion prepared by Judge Martin, and entirely concur in it. There is no subject on which a uniform rule is more desirable, than on the one under consideration. The mode of computation adopted appears to be almost universally pursued throughout the commercial world. It is less liable than any other to error and uncertainty. This, in addition to the reasons assigned in the opinion just delivered, should, in my opinion, entitle it to a preference.

BULLARD, J. I concur in the opinion pronounced by Judge Martin. The article 2055 of the Louisiana Code, declares that where the term referred to by the contract consists of one or more months, the parties, if they have not made any other explanation, shall be deemed to have meant months in the order in which they stand in the calendar after the date of the obligation, and with the number of days such months respectively have. A literal interpretation of this article would, perhaps, sustain the judgment of the Commercial Court; but I think it important to give it such a construction as will conform to general commercial usage in this, as well as in other States. This usage and general understanding appear to be as stated by the senior judge.

GARLAND, J., *dissenting*. The defendant being sued as the endorser of a promissory note, drawn by one Hall, for answer, alleged fraud, in altering the note from \$250 to \$2500, after it was endorsed. He further avers that he is not bound as endorser, as the note was not protested in due time, and notice given to him.

Upon the first ground of defence, I concur with the majority of the court, that no such fraud was shown in obtaining the endorsement, or in altering the note, as will discharge the defendant. This note, and another appear to have been signed and endorsed

in blank, both as to amounts and dates. When Hall filled up the note sued on, he dated it on the 31st of September, 1839, payable six months after date. The note was protested for non-payment on the 3d of April, 1840, and notice given to the defendant, who contends that demand of payment should have been made on the 2d of April, as the note was due on the 30th of March, 1840. The main question in the case is, which was the proper day of protest. There is no difference of opinion as to the date of the note. The 31st of September being an impossible day, the note is to be considered as bearing date on the 30th of that month. The counsel for the defendant contends that the note became due on the 30th of March, 1840, and that it should have been protested on the 2d of April. I do not think so.

The Civil Code, article 2055, says, "that where the term referred to by the contract, consists of one or more months, the parties, if they have not made any other explanation, shall be deemed to have meant months in the order in which they stand in the calendar after the date of the obligation, and with the number of days such months respectively have." It is not denied that if this article be applicable to the case, the protest was properly made on the 3d of April, and that the defendant is bound; but it is contended that this positive provision of the Code is to be disregarded, and the matter regulated by the commercial law, or, in other words, that this article of the Code does not apply to promissory notes and bills of exchange, but to other contracts, because it was the intention of the legislature, when the Civil Code was adopted, to have also made a Commercial Code; and that not having done so, the case is to be governed by the general commercial law. That it was the intention of the legislature which ordered the amendments to the old Civil Code to be prepared, to have a Commercial Code prepared, I do not deny; but that it was the intention of the legislature which adopted those amendments, or of any subsequent legislature, to adopt a Code of Commerce, I do not admit; and the evidence of this is, that none has ever been adopted, or even seriously considered by any legislature since the one that ordered the preparation of such a Code. I cannot consent to disregard a positive law, because a particular legislature may, at a distant day, have intended to make some other law on the sub-

ject. The argument is peculiarly unfortunate, since it is not shown that the case was provided for in the Commercial Code prepared by the jurisconsults.

If A. and B. make a contract by a notarial act, the term of its performance is regulated by the article 2055 of the Code ; but if they make a promissory note, founded on the same consideration, then a shorter term is stipulated, though the same language be used to express their intentions, and the promise be identical in every respect. I cannot, upon the authority of a case of palpable judicial legislation, consent to disregard as general a provision of the Code as any contained in it.

That it was not the intention of the legislature which sanctioned the amendments to the old Civil Code, to leave every thing in relation to commercial matters to be regulated by a Code of Commerce, is apparent from the number of provisions in the new Code and in our statute law, in relation to commerce, and to those engaged in trade.

But it is assumed that the commercial law has regulated this matter in France, England, and the United States, in favor of the position assumed by the defendant's counsel. That the French authorities go far to sustain the position assumed, I admit ; but that it is settled in England, or in the United States, by any great weight of authority, I do not concede.

In England it is well settled that in cases of bills of exchange and promissory notes, the month named in those contracts is a calendar month. 2 Black. 141. 3 Brad. & B. 187. 3 Starkie on Evidence, part 4, 1399.

Chitty, in his Treatise on Bills, says, that "where bills are payable at one, two, or more months after date or sight, the mode of computing the time when they become due, differs from the mode of computation in other cases" When a deed, or act of parliament mentions a month, it is construed to mean a lunar month, unless otherwise expressed ; but where a bill is made payable a month, or months after date, the computation must, in all cases, be by the calendar month.

Where a bill is payable so many days or months after date, the day of the date is excluded in the computation. Thus a bill dated on the 1st of January is due on the 1st and 4th of Feb-

ruary. Chitty, 267, 268, ed. 1826. Bayley, 113. The same principles are well settled in the United States. 1 Johns. Cases, 99. 15 Johns. Rep. 120. 1 Mason, 176. 4 Dallas, 143. The note in this case is at six months after date; the time, therefore, commenced running on the 1st of October, 1839, and six calendar months carried it to maturity on the 31st March, exclusive of the days of grace.

But it is said that this mode of computation does very well when a note or bill is dated, or accepted, on the first or the last day of a month; but that if it is to run from some other day, then it must fall due on the corresponding day in the next month. This is true, but it gives the debtor precisely the same space of time, that is the same number of days to discharge his debt. For instance, a bill dated January 15th, payable one month after date, becomes due on the 15th—18th of February, which gives thirty-one days, exclusive of the days of grace. So a bill dated February 15th, will mature on the corresponding day in March, and give twenty-eight or twenty-nine days for it to mature, according to the year in which it may be dated; and thus it will continue the year round, neither party obtaining any advantage over the other. But if the computation contended for by the defendant be correct, the year would be divided into parts of 181 and 184 days, and there would not, in either case, be six calendar months. There are 182 days from the 30th of September to the 31st of March, and 183 from the 31st of March to the 30th of September, which divides the year as equally as it can be done without fractions.

The weight of testimony in relation to the custom in New Orleans is in favor of the note falling due on the 30th of March, 1840, but I do not think the custom is so well and generally established as to become a law; and it is evident that the custom operates to the advantage of the banks, and of creditors whose claims are bearing interest.

I, therefore, think the judgment of the Commercial Court ought to be affirmed.

THE BANK OF PORT GIBSON *v.* WILLIAM HENDERSON.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. This case is not to be distinguished from those of Williams, and Hall and Bien against the same defendant, reported in 18 La. 557, 563.* They all depend on the same evidence, and nothing is shown in this case which evinces an intention to change his domicile on the part of the defendant, further than was proved in the former cases, except that he was still acting, at the trial of this case, as a commission merchant in New Orleans. The trial upon the exception took place shortly after that in the other cases.

The judgment of the District Court is, therefore, reversed, and ours is that there be judgment for the defendant as in case of nonsuit, with costs in both courts.

Grymes, for the plaintiffs.

Emerson, for the appellant.

ROBERT HENRY JACKSON *v.* THE COMMERCIAL BANK OF NEW ORLEANS.

Where a bill of exchange is assignable only by endorsement, one who obtains possession of it by a forged endorsement, acquires no interest, though ignorant of the forgery; and the original holder may recover of the acceptor, though the latter have paid the amount of the bill to the person in possession under such endorsement, unless it be shown that such payment was made through the fault of the original holder; but the fault must be shown, and the burden of proof is upon the party who justifies the payment.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

I. W. Smith, for the plaintiff, cited *Dick et al. v. Leverich*, 11 La. 573. *Brown v. Depau*, 1 Harper's Const. Rep. 258.

* These cases turned on a question of fact, raised on an exception to the jurisdiction of the District Court of the First District. The ground of the exception was, that the defendant's domicile was in the parish of Carroll, and not within the First District.

Maybin, for the appellants.

BULLARD, J. This is an action against the drawer of a bill of exchange, or check at sight upon the Girard Bank of Philadelphia, which was duly protested for non-payment. The defence is, that the original bill of exchange, of which a duplicate or second set is sued on, was duly presented and paid by the defendant. The payment is not contested; but it is alleged by the plaintiff that it was made to a person not authorized to receive payment, and without his endorsement.

It is clearly shown that the endorsement was not genuine, and, consequently, the Girard Bank paid, in its own wrong, the original draft. The rule of law recognized in the case of *Dick et al. v. Leverich*, 11 La. 573, was, that where a bill is assignable only by endorsement, a person who obtains possession of it by a forged endorsement, acquires no interest in it although ignorant of the forgery, and that the original holder may recover of the acceptor, although the latter may have paid it.

The principle settled in that case appears to us applicable to the present, without any further proof of the loss of the original draft. It is true that cases may be supposed in which the rule would operate a great hardship, and where by collusion the original holder may be twice paid. But whenever it could be shown that, through the fault of the original holder, a loss had been sustained by payment to a person in possession of the instrument even with a forged endorsement, it would seem contrary to equity that he should be allowed to recover. But the fault must be shown, and the burden of proof is upon the defendant who seeks to justify a payment made in the course of business. We do not, however, consider the articles of the Code, which have been cited, relating to lost instruments, as having any bearing upon the present case. They relate to cases where the lost instrument becomes the foundation of a suit or defence, that is to say, wherever the original written title cannot be produced, and it becomes necessary, in order to enforce an obligation, or establish an exception, to resort to secondary evidence. Civ. Code, arts. 2258, 2259.

Judgment affirmed.

Wood and another, for the use &c., v. Boyers and another.

LARKIN F. WOOD and another, for the use of Hills and Sinnott,
v. R. M. BOYERS and another.

Where two persons are indebted to each other, compensation takes place from the moment the two debts co-exist. They extinguish each other, by the mere operation of law, to the amount of their respective sums.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

I. W. Smith, for the appellants.

Micou, for the defendants.

MORPHY, J. This suit is brought on a bill of exchange for \$2982 15, drawn by the defendants, in favor of Peters and Millard, on the firm of L. F. Wood & Sinnott, the present plaintiffs, and by them accepted, payable on the 15th of January, 1840. They allege that they paid this bill at its maturity, without any funds or property of any description having been placed in their hands by the drawers. The answer admits that the plaintiffs accepted and paid the bill sued on, as they set forth in their petition; but avers that, at the time of such acceptance and payment, they stood indebted to the defendants in the sum of \$2464 44, being the amount of a bill of exchange which plaintiffs had accepted, in their favor, dated the 8th of July, 1838, payable six months thereafter, and which they, the acceptors, failing to pay at maturity, the defendants were obliged, as endorsers, to pay, and which they have ever since held. The answer further avers that the defendants are entitled to interest on said bill, and to the costs of protest, and prays that they be allowed to plead the same in compensation. There was a judgment below in favor of the plaintiffs for two hundred and eighty-five dollars and fifty-one cents, with five per cent interest, from the 15th of January, 1840. Being dissatisfied with this judgment, the plaintiffs have appealed.

The only question presented by the pleadings is, whether the defendants' plea in compensation be well founded; and it presents, in our opinion, not the slightest difficulty. The evidence clearly shows that at the time the plaintiffs paid the accommodation acceptance on which they sue, they were indebted to the defendants in the amount of the draft which they had accepted in their favor. From the moment that the two debts co-existed, they

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extinguished each other, by the mere operation of law, to the amount of their respective sums, and defendants remained liable only for the difference. If, since that time, Hills and Sinnott, for whose account this suit is brought, have become the owners of the bill sued on, they became entitled only to the surplus standing in favor of their assignors, and can recover no more. The plaintiffs have failed to show that their acceptance has ever been paid, or that it was made by L. F. Wood alone, for his individual benefit.

Judgment affirmed.

MICHAELA LEONARDA, BARONESS OF PONTALBA, v. THE PHOENIX ASSURANCE COMPANY OF LONDON.

Under a policy of insurance on a house, with the condition that, in case of loss, the assurers may either re-instate the building, or pay the amount of the loss as soon as proved, rent for the period occupied in rebuilding or repairing, cannot be recovered as part of the indemnity due to the assured. Such rent formed a distinct insurable interest.

The general principle, that the assurers are bound to adjust a loss upon the principle of replacing the assured, as near as may be, in the situation they were in before the fire, has never been understood to extend to the profits or fruits which the latter was drawing, or might have drawn from the thing insured.

APPEAL from a judgment of the Parish Court of New Orleans, *Maurian, J.*, in favor of the defendants.

This case was submitted, without argument, by *Buisson*, for the appellant, and *L. C. Duncan*, for the defendants.

MORPHY, J. Certain stores and buildings, insured against fire, having been partially destroyed, were rebuilt, or rather repaired, by the defendants, under a clause in the policy worded as follows. "When any loss shall have been sustained by fire upon property insured, the Company will either re-instate the same, or the assured, as soon as such loss or damage shall have been duly proved, shall immediately receive payment of his claim." This suit is brought to recover \$1200, for the rent of the stores during three months that the rebuilding or repairing of them lasted. The question is,

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whether, under the above recited clause in the policy, the defendants are bound to pay the rent of the property during the time that was occupied in re-instating it. There is no dispute as to the value of the rent, nor as to the necessary duration of the repairs made to the premises. In the absence of an express stipulation, such as appears to exist in the policies of several Insurance Companies of this city, that during the rebuilding or repairing of a house, rent shall be paid as a part of the indemnity due to the assured, it cannot be contended, on any legal principle of insurance, that a policy on a house covers any part of the rent, which is a thing distinct from the subject matter of the insurance, and constituting of itself an insurable interest. The obligation of the defendants to the assured could be discharged, either by the payment of the amount of the loss or damage sustained, or by re-instating the property in its former condition. The latter alternative necessarily implied some reasonable time for its execution. Of this the insured was aware. No rent having been stipulated for during that time, none can be exacted. The testimony shows that the amount for which the repairs could have been made was tendered to the plaintiff's agent, but that he refused to receive it, thus throwing on the defendants the obligation of repairing the house. By doing this, he could not surely impose upon them the additional obligation of paying the rent during the repairs. This rent was no part of the thing insured. If the plaintiff wished to secure its amount during the rebuilding of her stores, whether done by herself or by the defendants, she should have made an express stipulation to that effect, or have caused a separate insurance to be made on it. But it is urged, in support of the present claim, that a policy of insurance being a contract of indemnity, the underwriters are bound to adjust the loss upon the principle of replacing the party assured, as nearly as may be, in the situation he was in before the fire. This is unquestionably true as a general principle, and in relation to the subject matter insured, but it has never been understood to extend to the profits or fruits the assured was drawing, or might have drawn, from the thing insured. These are consequential losses, for which he cannot be indemnified, especially when such losses fall on things susceptible of being insured separately. There is much analogy between the

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rent of a house and the freight of a ship; both are the civil fruits of the thing from which they are derived. It is believed that the attempt has never been made to recover freight under a policy of insurance on a vessel; and yet the loss of the freight, like that of the rent, is a direct consequence of the destruction of the vessel. In both cases the loss falls on a thing which is no part of the object insured, and which is not, therefore, covered by the policy. 1 Phillips on Insurance, 190. 2 Marshall on Insurance, 722.

Judgment affirmed.

JANE BALDWIN v. THE UNION INSURANCE COMPANY.

Where an action had been commenced by a married woman, without the authority of her husband or of the court, who two days after obtained a judgment of separation from bed and board, on an exception to her right to sue, *Held*: that the exception should be overruled, as it would have been useless to dismiss a suit which might be commenced immediately afterwards, her disability having been removed.

By the Roman law, one who made constructions on soil which he knew to belong to another, was presumed to be willing to lose his materials, and had no claim against the owner of the ground, who acquired an absolute right to whatever was erected on it. By the laws of this state, Civ. Code, art. 500, the owner of the soil has the right to have the buildings removed at the expense of the person who erected them, or to keep them on paying the value of the materials and the price of the workmanship; but, until this election be made, such works, though subject to the right of acquisition given to the owner of the soil, continue to belong to, and are at the risk of the party who erected them.

All the rights and property of the insolvent pass to his creditors by the surrender, whether included in his schedule or not.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* MORPHY, J.* On the 21st of March, 1837, Joseph D. Baldwin effected insurance on two houses situated in the city of Lafayette, for \$6,500. The policy was afterwards transferred by him to his wife Jane Baldwin, with the consent of the company, and on the 8th of April, 1838, was renewed by her for another year from the 21st of March, 1838. The houses insured were

* GARLAND, J., being interested, did not sit on the trial of this case.

destroyed by fire on the 3d or 4th of January, 1839. It is admitted that they were built during the marriage between the plaintiff and Baldwin, on two lots of ground belonging to John Charles Deacon, a minor, the son of the plaintiff by her first marriage with John Deacon, who had previously purchased these lots of Samuel Livermore some time in 1825. This suit is brought by the plaintiff, in her own name, to recover the amount of the policy which she avers is due to her in her own right, and as natural tutrix of her son. The defence is, that the plaintiff has no right of action on the policy. That she never was the owner of the houses insured, but that they were built by Baldwin during the marriage, and not with any funds belonging to her. That the assignment of the policy to her was illegal, void, and intended to defraud the creditors of the community, to the knowledge of the plaintiff, Baldwin being then in insolvent circumstances. That shortly after the assignment, Baldwin applied for the relief accorded by law to insolvent debtors, and that oppositions were filed, charging him with fraud for not surrendering to his creditors his interest in these houses, which are still pending. That the defendants have been notified by one of the creditors not to pay the insurance money to the plaintiff; and, finally, that the underwriters are not liable at all on their policy, because Baldwin set fire to the houses himself. There was a judgment below in favor of the plaintiff, and the defendants have appealed.

Roselius, for the plaintiff. All constructions and improvements made on the soil, are presumed to have been made by the owner of the soil, and at his expense. Civ. Code, art. 498. The soil is proved to belong to plaintiff's minor child; and no evidence has been adduced to repel the presumption that the buildings were erected at his expense. The title to the buildings would still be in the owner of the soil, though the evidence should be considered to have established that they were erected at the expense of another. The Roman law is express on this subject. "*Ex diverso, si quis in alieno solo sua materia ædificaverit, illius fit ædificium, cujus et solum est. Et si scit alienum solum esse, sua voluntate amisisse proprietatem materiæ intelligitur. Itaque, ne diruto quidem ædificio, vindicatio ejus materiæ competit.*" Pandectæ, lib. 41, tit. 1, n. 26. De Acquirendo Rerum Dominio. See also Pothier, Traité

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de Propriété, No. 120. Merlin, Rép. de la Jurisp., *verbo* Accession. 1 Motifs et Discours du Code Civil, 292—297. Institutes, lib. 2, tit. 1, De Divisione Rerum et Qualitate, § 29, 30. Her minor child and ward having a legal title to the buildings, the plaintiff had an insurable interest. She had a direct interest in the rents, and being bound to administer the property with prudence and care, she would, in case of failure to insure, have been responsible for the loss. This responsibility extended to Baldwin, the second husband, who became a tutor by his marriage. Any interest is sufficient to enable a party to insure; and he need not disclose its nature, unless the information be requested. See Philips on Insurance.

Hoffman, contra. The judge below erred in deciding, 1. That the houses belonged to the owner of the lots; 2. That the payment of the premium made the policy the plaintiff's; 3. That the burning of the houses, by the husband, did not affect the wife's right to recover. The Civil Code of this state, article 500, provides for the case of buildings erected on ground belonging to another. It gives the latter the right to retain the buildings, on paying the cost of the materials and workmanship, or to require their removal. The buildings could not, in the present case, have ceased to belong to the community existing between the plaintiff and her husband, till the owner of the soil had made his election whether to retain them or not. No such election was made. The premium, though paid by the wife, must be presumed to have been made with the funds of the community; and there was no evidence to the contrary. The husband is the head of the community, and if, by any act of his, he destroys the common property, the loss must fall on the community.

MORPHY, J. The judge overruled, correctly we think, an exception taken to the plaintiff's right to sue, on the ground that at the time of the institution of this suit she had not been separated from bed and board from her husband, and had received no authority to sue either from him or from the court. It appeared, on the trial of the exception, that the judgment of separation from bed and board had been rendered on the 8th of April, 1839, two days after the filing of her petition in this case. It would have been doing a vain and useless thing, to dismiss a suit which she

could have brought again the very next day, her disability having been removed. Code of Pract. art. 106. But it is said that the judgment of separation is a nullity, unless executed, and that nothing shows that it has been executed. It appears from the evidence that Baldwin had failed some time before, and that he had left the state for Texas shortly before the rendition of the judgment of separation, which does not decree him to pay any sum of money, but gives his wife the possession and management of some property she had sequestered. We cannot see what further execution such a judgment is susceptible of.

In support of the plaintiff's right to recover, it is urged, that under article 498 of the Civil Code, all constructions and improvements made on the soil are presumed to have been made by the owner, and at his expense, and to belong to him until the contrary is proved; that the soil, in the present case, is shown to belong to the plaintiff's son, of whom Baldwin, her second husband, became co-tutor; that it must be presumed that he had the insurance effected for the benefit of the minor, because it was his duty, as well as that of the natural tutrix, to administer their ward's property with care and prudence, and therefore to have it insured; and that it must be further presumed, that the transfer of the policy from Baldwin to his wife, was made to her in her capacity of natural tutrix; that thus she had an insurable interest in her own right, and was not bound to disclose the nature of her interest, unless the underwriters asked for information on the subject. The facts of the case stand in opposition to this string of presumptions. The whole evidence in the record, taken together, satisfies us that the houses in question were built by Baldwin, and at his expense. This impression is much strengthened by the absence of proof that the minor had any means whatever, independent of the vacant lots left to him by his father. But it is contended, that even if these houses were put up at the expense of Baldwin, still the property vested in the owner of the lots; and we have been referred to the Roman law, book 41, tit. 1, sect. 12, *De Acquirendo Rerum Dominio*. Under the Roman law, the doctrine of accession was carried so far, that the person who made constructions on a soil which he knew to belong to another, was presumed to be willing to lose his materials, and had no claim

whatever against the owner of the soil, who acquired an absolute right to whatever was erected on it. Our law, Civil Code, article 500, has so far modified the effects of accession in such cases, as to give to the owner of the soil only the alternative of having the buildings removed at the cost of the person who erected them, or of keeping them as his own on paying to the owner of the materials their value and the price of workmanship. Until this election be made, the works, although subject to this right of acquisition given to the owner of the soil, continue to belong to, and are at the risk of the person who made them. Had these houses not been insured, the loss would surely have fallen on Baldwin, or his creditors, who would have had no claim whatever against the owner of the soil. Baldwin, who at least had an insurable interest in, if not the absolute ownership of these houses, procured an insurance in his own name, not in that of the minor. He afterwards transferred the policy to his wife in her individual capacity, not as tutrix of her child. A transfer by one tutor of the minor to the other, had the policy really been taken for his benefit, would have been a most idle and senseless proceeding. On the 7th of April, 1838, Jane Baldwin had the policy renewed for one year, by paying the premium in her own name, and not as tutrix. Soon after the fire, she handed to the company a description of the property destroyed, which she represents under oath as belonging to herself and not to her ward. From all these circumstances, it is apparent that Baldwin, who is represented to have been in failing circumstances for some time before, intended, by this transfer of the policy to his wife, to make over the property to her; and that she believed that she had thereby acquired a title to it, and continued under this belief even after the fire had occurred. It is obvious that this assignment was void, and produced no change either in the right to the property, or in the title to the policy. It is equally obvious that the renewal of the policy enured to the benefit of the community, whether the premium was paid by the husband or by the wife. The legal presumption is, that it was paid with funds of the community. Civ. Code, arts. 2420, 2371. When Baldwin failed in July, 1838, all his rights and property, as head of the community, passed to his creditors by the surrender, whether included in his schedule or not. 11 La. 531.

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It is true that these houses could not be surrendered as a subject of property distinct from the land, but he transmitted to his creditors his interest in them subject to the election given by law to the owner of the soil, and his claim for the amount of the policy in case of their destruction by fire. What title then has the plaintiff to claim either, in her own name, or as tutrix of her child? She has shown none in herself. As to the minor, the property was destroyed before the event by which he might have acquired the absolute ownership of it. And, moreover, his interest, if he had an insurable one in it, was not protected, nor intended to be protected by this policy. This view of the case renders it, perhaps, unnecessary to express any positive opinion on that part of the defence which charges Baldwin with having himself set fire to the houses. We must say, however, that the evidence raises a strong presumption that he did commit the act. Shortly before the fire, and when the suit for a separation was pending, he declared to several persons his determination that his wife should derive no benefit from the houses. This was, no doubt, said under the belief that, by the transfer of the policy, made to her when a better state of feeling existed between them, she had become the owner of the property. We find him, also, on his arrival at Galveston, to which place he fled the day after the fire, writing letters to the defendants, in which he urges them not to pay the loss, and attempts to direct their suspicions against the plaintiff.

It is therefore ordered, that the judgment of the Commercial Court be reversed, and that ours be for the defendants, with costs in both courts.

JAMES MARTIN v. S. BRYAN and another.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case was submitted, without argument, by *Roselius*, for the plaintiff, and *C. M. Jones*, for the appellants.

MORPHY, J. This suit is brought on an open account, the

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principal item of which is for one thousand and seventy-one boxes of lemons, sold to the defendants at two dollars and fifty cents per box. The defence set up is, that the purchase was made from a sample, and that upon examination the lemons were found to be unsound, unmerchantable, and not corresponding with the sample exhibited. There was a judgment below for the plaintiff.

This case turns upon a question of fact. After an examination of the record, we find nothing in it which should prevent us from adopting the conclusion to which the judge below arrived.

Judgment affirmed.

THE POLICE JURY OF THE PARISH OF POINTE COUPÉE v. CHARLES GARDINER and another, Syndics.

The act of the 28th Feb., 1831, authorizing the Police Jury of Pointe Coupée and certain other parishes, to cause the necessary work to be done to the roads, levees, bridges, &c., in those parishes, gave a summary remedy to the undertaker employed by the Police Jury, and extraordinary powers to the Parish Judge, to issue orders of seizure and sale for any amount in such cases. But where, from any informality in the proceedings, such summary process cannot be issued, the Police Jury may nevertheless recover, *via ordinaria*, from the proprietor of the estate, at least so far as such work has been advantageous to him, the cost of works which both his interest and the general safety required to be executed. But such recovery cannot be had under proceedings before the Parish Judge, commencing with an order of seizure and sale under the act of 1831, by changing the executory into ordinary process, the Parish Judge having no jurisdiction of the question presented in an action, *via ordinaria*.

Section 4, of art. 3216 of the Civil Code, gives a privilege on the land for improvements to the levees, bridges, roads, &c., not only to one who has made such improvements by contract or job, but to any one who has applied his own labor to that purpose under the authority of the police regulations; and where work has been done, which the regulations of police require the owner himself to perform, and by which the land has been rendered more valuable, the land itself will be affected by the privilege, which, if recorded in the proper office, will pass with it into the hands of third persons. Where the work has been regularly adjudicated and done by the job, the amount for which a privilege exists, is liquidated; otherwise, it must depend on the proof of its utility to the proprietor; and in an action on a *quantum meruit* evidence will be admissible to show the increased value of the land.

Any attempt to amend a bill of exceptions, after judgment signed, is wholly irregular.

The plaintiffs are appellants from a judgment of the District

Court of the First District. They allege in their petition that Sebastian Hiriart was the owner of a tract of land in the parish of Pointe Coupée ; that he had for a long period neglected to repair and keep in proper order a levee and public road on the said land, as he was bound by law to do ; that his neglect had exposed many contiguous plantations to the danger of inundation ; that the Inspector of Roads and Levees for the district in which the land is situated, had advertised the work necessary to be done on the land for sale, giving due notice thereof to Hiriart ; that the work was adjudicated, on the 1st of December, 1831, to Charles Morgan, the lowest bidder, for the sum of \$6000 ; that Morgan had completed the work according to the terms of the adjudication, it having been approved and received by the Inspector ; that the plaintiffs paid Morgan the \$6000 ; and that the *procès-verbal* of the adjudication was duly recorded by the Recorder of Mortgages of the parish of Pointe Coupée, on the 6th December, 1831, whereby they acquired a privilege on the land for the amount thus paid, with interest. The plaintiffs further allege, that on the 30th September, 1834, Hiriart sold the land to Adelaide Bourgeat, the wife, separated in property, of James Fort Muse, by notarial act, in which the privilege was recited ; that in 1837 she and her husband sold it to one William Smith ; and that Smith, having applied for the benefit of the insolvent laws, surrendered it to his creditors, of whom the defendants are the syndics. The plaintiffs aver that more than thirty days previous to the institution of suit, they demanded payment of the sum of \$6000, with five per cent interest from the 1st December, 1831, of Hiriart, and that he refused to pay the same. They allege that the syndics of Smith are bound to sell the land, and that plaintiffs are entitled to have their claim, with interest, paid out of the proceeds ; and that the syndics, though amicably requested to so do, refuse to acknowledge their right to be paid thereout. They further aver, that they are entitled to be paid as before claimed, though it should be proved that the adjudication of the work to Morgan was irregularly made in consequence of the omission of certain formalities prescribed by law, because the land has been benefited thereby, and would have been worthless and unsaleable had such work not been done. The petition concludes with a prayer, that the defendants may be order-

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ed to sell the land at a short credit ; and to file an account immediately afterwards, placing the petitioners thereon as privileged creditors of the first rank ; and that they be decreed to pay the amount claimed, with interest and costs.

An exception of *res judicata*, sustained by *Buchanan, J.*, having been overruled by the Supreme Court, 14 La. 68, and the case remanded for further proceedings, the defendants answered, admitting that they were the syndics of Smith, that the land had been conveyed as alleged in the petition, but denying that any lien or privilege existed thereon in favor of the plaintiffs, or that the latter had any claim whatever against the estate of the insolvent. They further averred that Marguerite Adelaide, the wife of James Fort Muse, was the vendor of their insolvent, and that she was separated in property from her husband ; and prayed that she and husband might be cited in warranty, and for judgment over, &c.

Marguerite A. Muse answered, denying that she was ever liable either to the Police Jury, or to the syndics of Smith. She averred that if any work had been executed by Morgan, the sum claimed for it was exorbitant ; and concluded with a prayer that Sebastian Heriart, her vendor, might be cited in warranty, &c. Heriart denied generally all the allegations in the petition, and answer ; averred that if he should be found to owe any thing, it could only be the amount which he had profited by the work ; that the amount claimed was exorbitant ; and that the plaintiffs had lost all claim against him by their neglect to give him notice of the repairs necessary to the levees, &c.

Evidence was introduced to establish the adjudication to Morgan, the inscription of the *procès-verbal* among the records of mortgages in the office of the Parish Judge of Point Coupée, Morgan's execution of the work, the sale from Hiriart to M. A. Muse, and from her to the insolvent, Smith. Transcripts of the records in the suit brought by Morgan against Hiriart, praying for an order of seizure and sale of the land, and in the suit by the same plaintiff against the Police Jury of Point Coupée, were introduced. Proof was offered of the payment to Morgan by the plaintiffs of the contract price, as alleged in the petition.

The plaintiffs having offered in evidence the testimony of certain witnesses, taken under a commission, for the purpose of es-

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tablishing the value of the work done on the land, the counsel for the defendants and the party cited in warranty, objected to its introduction, on the grounds : 1, that it tended to prove the value of work done on the land, and that such evidence was inadmissible against third persons, who could only be made responsible for the value of the work, in case a lien attached to the land, which the Supreme Court had, in the case of *Morgan v. The Police Jury of Pointe Coupée*, decided not to exist: 2, that part of the testimony tended to show the manner in which the adjudication of the work had been made to Morgan, the contract between him and the plaintiffs being, as to the defendants, *res enter alios* &c. This testimony was rejected, and the plaintiffs excepted. There was judgment in favor of the defendants. After judgment had been signed, the counsel of M. A. Muse was allowed, on a rule against the plaintiffs, to amend the bill of exceptions which had been taken in the course of the trial.

Janin, for the plaintiffs. The inferior court having rejected the testimony offered under the commission, which constituted nearly the whole evidence on behalf of the plaintiffs, should have rendered a judgment as in case of nonsuit, and not one for the defendants. The exception to the rejection of this testimony, is the only matter now before the court; and presents the same question that was raised on the former appeal, and which has consequently been finally settled by a judgment of the court. That judgment is the property of the plaintiffs. The judgment of the lower court, to which the exception now before the court was taken, declares in substance, that this being a hypothecary action, *via ordinaria*, to enforce against a third possessor a mortgage attaching to the property before he purchased, and it appearing from a decision of the Supreme Court that the lien was lost, or rather never attached, the plaintiffs are without any right of action against the third possessor, and cannot be permitted to offer evidence in support of the lien. This is precisely the objection raised on the former trial sustained by the lower court, and reversed on appeal, 14 La. 68. As no action could be sustained against a third possessor unless a privilege existed on the land, by declaring that the action might be maintained, the Supreme Court declared, by implication, the lien to be valid, though capable of being enforced only, *via ordinaria*, on a

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quantum meruit. The legal grounds on which the privilege rests, are stated at length in the argument on the former trial, 14 La. 70. Independently of the act of 1831, the general law of the land compels riparian proprietors to make levees on their lands. The act of 1810, Bullard & Curry's Digest, 640, imposes on the Police Jury the duty of superintending the making and repairing of levees.

The only remaining question is, as to the preservation of the privilege. It was created by the *nature* of the work. Every act that gives notice of the work, and is recorded, preserves the privilege. Whether the land be affected in the hands of third persons depends on their knowledge of the claim, and whether it be derived from the record, or from other circumstances, is immaterial. Civ. Code, arts. 3314, 3315. If the adjudication was not made in compliance with the forms of law, it loses its effect as *conclusive* evidence of the *amount* of the claim, and, like an informal act of mortgage, gives no right to executory process; but the privilege itself could be destroyed only by want of knowledge, actual or constructive, on the part of the purchaser.

R. N. Ogden, for the appellees. The principles on which the sight of action rests in the present case, were settled in the case of the *Police Jury v. Hampton*, 5 Mart. N. S. 389, in which it was held that the claim was personal against the owner.

BULLARD, J. Morgan having made a new levee on the front of a tract of land belonging to S. Hiriart, under an adjudication by authority of the Police Jury of Pointe Coupée, obtained an order of seizure and sale from the Parish Judge, in pursuance of the act of the legislature of 1831. That order was opposed, on the ground of irregularity in the proceedings by which the work was adjudicated. The opposition was successful both in the District and the Supreme Court. See 5 La. 43.

Failing in his proceeding *in rem*, Morgan brought his action against the Police Jury, through the fault of whose agent he had not been able to enforce his lien upon the land. In that action he succeeded in recovering the amount of the price at which the work had been adjudicated. 11 La. 157.

The tract of land which had been benefited by the work thus done, was sold by the then owner to Marguerite A. Muse, and in the act of sale it is recited, that according to the records of mort-

gages, no other exists upon the land except the inscription made on the 6th of December, 1831, of the *procès-verbal* of an adjudication to Charles Morgan of work to be done on the land for \$6000, against the effect of which inscription the vendor agrees to warrant. The land was afterwards sold to Smith, whose syndics are the defendants in this case. The present action is brought by the Police Jury against the syndics of Smith, to cause them to sell the tract of land, that the plaintiffs may be reimbursed out of the proceeds of the sale, they alleging that they have, by law, a privilege on the land for the value of the improvement.

M. A. Muse was cited in warranty by the syndics, and she, in her turn, has cited in warranty Hiriart, her vendor. The parties are, therefore, all before us; and the pleadings present the question, whether the Police Jury, under all the circumstances of the case, and according to the provisions of the Code, are entitled to be reimbursed, so far as the levee has added to the value of the land. Hiriart, in his answer, denies being bound at all. He says that M. A. Muse has no right to call him in warranty, because at the time of the sale she knew of the situation of the parties, and the alleged claim upon the plantation. He avers, that if he should owe any thing, which he denies, he owes only the amount which he has profited, and not the extravagant and enormous sum alleged to have been paid by the Police Jury. He further says that the Police Jury have lost all their claim on him, by their own carelessness and neglect in not giving notice of the repairs rendered necessary.

In the case of the *Police Jury of New Orleans v. Hampton*, this court held, that although no action could be maintained against the owner for a breach of police regulations, without strict legal notice, yet the jury may recover the value of the repairs put on his property, if they were useful and necessary. The court proceeded upon the great principle of equity, that no man should be permitted to enrich himself at another's expense. Although this decision was given before the passage of the act of 1831, in virtue of which the adjudication in this case was recorded, the principle remains unaltered. That act gave a summary remedy to the undertaker employed by the parish, and extraordinary power to the Parish Judge to issue an order of seizure and sale for any amount

in such cases. But whenever, by reason of informalities in the notices or other proceedings, the summary process cannot be issued, no good reason suggests itself to our minds why the Police Jury, considered in the light of a *negotiorum gestor*, making repairs to a levee which not only the interest of the proprietor but the general safety required, should not be reimbursed, so far at least as the work had been advantageous to the owner of the land. The question could not be presented in that aspect in a proceeding commencing with an order of seizure and sale, by changing the executory into the *via ordinaria*, because the Parish Judge has no jurisdiction of such a question. His power is confined to the issuing of the process *in rem*, when all the forms of law have been previously complied with. But a privilege upon land for improvements made to levees, bridges, &c., exists independently of the act of 1831. It is recognized by article 3216, No. 4, of the Code, in these words: "Those who have worked by the job, or by employing their slaves in the manner directed by the law, or by the regulations of the police, in making or repairing the levees, bridges, ditches, and roads of a proprietor, on the land, the levees, bridges, and roads which have been made or repaired." The privilege is given, not only to one who by contract or job has repaired levees or bridges, but to any one who has applied his own labor to that purpose, when authorized by the police regulations. We are by no means disposed to give a narrow construction to this article. The general principles of equity, the best interests of agriculture, and considerations connected with the public safety, alike require, in our opinion, a liberal construction. Wherever, under circumstances contemplated by the police of the parishes bordering upon the Mississippi, an individual or the parish has done any work contemplated by the article above recited, by which the land on which the improved levee, road, or bridge exists, has been rendered more valuable—work which the regulations of the police required should be done by the owner himself, that owner is bound *ex æquo et bono* to make a proper remuneration; and the land itself is affected by a privilege, and if recorded in the proper office, it passes with the land into the hands of third persons. If the work has been done by job, the sum is liquidated; if otherwise, as contemplated in the second clause of the article, the

amount is necessarily not ascertained by any previous agreement, and will depend upon the proof of its utility to the proprietor.

We find nothing in any previous decisions of the court relative to this case, which militates against the views now expressed of the rights of the parties. On the contrary, the court remarked, in overruling the plea *rei judicatæ*, that such an action appeared to have been expressly reserved. 14 La. 72.

Having thus expressed our views as to the principles which ought to govern in this case upon the merits, we can better understand the force of a bill of exceptions, upon which it is now before us; for it appears that on the case being remanded, a new trial took place, during which certain evidence was rejected, and that a judgment was rendered for the defendant, as in case of nonsuit, from which this appeal is prosecuted.

The bill of exceptions shows that certain depositions of witnesses were rejected on the opposition of the warrantors, on the grounds: *first*, that the evidence tended to prove the value of the work done on the levee, and that such evidence could not be received against third persons, because such third persons could be made indirectly responsible for the value of said work only if a lien attached to the land, and that lien was lost in this case according to the decisions of the Supreme Court in the case of *Morgan against The Police Jury*; and *second*, that a part of the evidence tended to show the manner in which the adjudication was made to Morgan, and that that contract was, as to the defendants, *res inter alios acta*.

We do not think it our duty to notice the attempt made by rule to amend this bill of exceptions, further than to say, that such a proceeding is wholly irregular after judgment signed, and that in our opinion all the objections made to the admission of the depositions are sufficiently before us, whether embodied in the bill, or in the written objections annexed to the interrogatories.

It will have been perceived already what our opinion is upon this bill of exceptions. We think the court erred in rejecting the evidence to show the value of the work, and that it was done under the authority of the Police Jury. This matter is certainly not decided, as is stated in the bill of exceptions, in any of the cases which have come before this court. If the evidence were offered

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to show that the adjudication was conformable to the act of 1831, when on the face of it the contrary is shown, it would be inadmissible. But being of opinion that the land is bound for what has been added to its value by work done under the authority of the Police Jury, we think that, in an action upon a *quantum meruit*, the evidence to show the increased value of the land ought to have been admitted.

The legal obligation of riparian proprietors to construct levees cannot be questioned. The authority of the Police Juries of the different parishes to regulate the police of levees is equally clear, and although the contract made by the parochial authorities may be so defective in form as not to authorize a summary proceeding to be ordered by the parish judge, yet we have already said that the useful work done by such authority creates a privilege on the land, according to our construction of article 3216 of the Code. The last inquiry is, what is the amount which the plaintiffs are entitled to demand? It is not necessarily the price at which the work was adjudicated in an informal manner. The value is estimated variously by witnesses, from \$6000 to \$2000. According to the evidence, the land was rendered more valuable by at least the latter sum. *In dubiis, id quod minimum est sequimur.*

The judgment of the District Court is therefore reversed, and proceeding to render such judgment as should have been given below, it is further ordered that the defendants, the syndics of Smith's creditors, pay to the plaintiffs two thousand dollars out of the price of the tract of land; that the syndics recover over against M. A. Muse the same sum; and that she also recover over against Sebastian Hiriart, her warrantor, the said sum of \$2000, with interest at five per cent from judicial demand, and the costs in both courts.

HENRY VON PHUL and another v. E. C. SLOAN and another.

To construe a promise to accept a bill to be afterwards drawn, into an actual acceptance, so as to authorize a suit by the holder of the bill, as if accepted, the bill must be described in terms not to be mistaken. The description must be sufficient to identify the bill when sued on, and such as can apply to no other bill; it must result from the promise itself, and cannot be aided by any statement on the face of the bill.

The evidence necessary to support an action on a bill as an accepted bill, and on a breach of promise to accept, is materially different. To maintain the former, the promise must be applied to the particular bill alleged to have been accepted; in the latter case, the evidence may be of a more general character, and the authority to draw be collected from circumstances, and extended to all bills coming within the scope of the promise.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Rozier*, for the appellant.

Benjamin, for the defendants, cited *Coolidge v. Payson*, 2 Wheaton, 75. *Carrollton Bank v. Tayleur et al.*, 16 La. 490.

MORPHY, J. This action is instituted on a bill of exchange for five hundred dollars, dated at St. Louis, the 28th of November, 1840, and drawn in favor of the plaintiffs on the defendants by one Robert Bell, payable one hundred days after date. The bill mentions on its face that it is drawn as authorized by E. C. Sloan's letter of credit of the 12th of the same month. The letter of credit referred to in the bill is in the following terms, to wit:

"I hereby give Mr. Rob. Bell, of Chester, Ills., authority to draw on Sloan & Brother, of New Orleans, for any amount not exceeding fifteen hundred dollars, say \$1500, the drafts to be drawn at not less than 100 days after date. Drafts drawn under this authority will be honored by Sloan & Brother.

"E. C. SLOAN.

"*St. Louis, November 12th, 1840.*"

When the bill was presented, the defendants refused acceptance and payment of it, on the ground that they had been informed that the letter of credit on which it was drawn was obtained through false pretences. They are now sought to be held liable as acceptors, on the ground that the plaintiffs took the draft on the faith of the latter, and relied for payment of the same on the credit thereby given to the drawer.

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An exception was taken to the plaintiffs' right of action against the defendants as acceptors; and on this exception being sustained, and the suit dismissed, the petitioners appealed.

The question is whether this letter of credit be such an acceptance of the bills to be drawn under it, as authorizes suit against the signers of the latter by third persons, purchasers of the bills, and to whom the latter may have been exhibited at the time of the purchase.

In the case of *The Carrollton Bank v. Tayleur et al.*, 16 La. 496, we had occasion to enter largely into the examination of these promises to accept future bills. We there held, that in order to construe a promise to accept a bill to be drawn into an actual acceptance, so as to authorize a suit by the holder of the bill as if accepted, the bill must be described in terms not to be mistaken, and that the description must be such as to identify the bill or bills sued on. This we take to be the rule as laid down in the case of *Coolidge v. Payson*, 2 Wheaton, 75, and in the several subsequent adjudications on the subject. Before the rule in relation to these collateral acceptances on a separate paper was extended to bills not yet *in esse*, it was required that the promise or undertaking should point to the specific bill or bills already drawn. Why should it not be required as to future bills? To supply the place of a written acceptance on a bill, the promise to accept must describe the bill in such a way that the promise can apply to no other bill. In the present case the promise of the defendants points to no specific bill, but is a general authority to draw to a certain amount, and the time at which the drawing must take place is limited at no less than one hundred days from the date of any bill to be drawn. So far, then, from describing any particular bill so as to identify it, the letter of credit might be made to apply to bills of different amounts, and payable at different times, within the limits mentioned in it as to amount and time. An attempt has been made to identify the bill sued on, by stating on its face that it is drawn in pursuance of the letter of credit. This may be done in every case, however general may be the authority to draw; it surely cannot add any thing to it. The description or identity necessary to charge the writer of a promise to accept as an actual acceptor, must result from the promise itself. The defendants

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may be liable to Robert Bell on the breach of their promise to accept his bills ; but this promise is not such, in our opinion, as to authorize a suit on it, as an acceptance, by the holders of such bills. In *Boyce and Henry v. Edwards*, 4 Peters, 122, Thompson, J., after reviewing the several adjudications, in which the rule on this subject is laid down, says : " The distinction between an action on a bill as an accepted bill, and one founded on a breach of a promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances and extended to all bills coming fairly within the scope of the promise."

The letter of credit given in this case we cannot view in any other light than as a general authority to draw in a certain manner, and to a certain extent ; but it is not an acceptance of any particular bill or bills.

Judgment affirmed.

THE BANK OF ALABAMA v. CHARLES F. HOZEY and another.

The rights of a creditor claiming a privilege on property in the hands of a judicial sequestrator, cannot be determined without making such creditor a party to the suit. The judicial sequestrator does not represent him.

Where property in the hands of a judicial sequestrator, has been seized under process from another court than that which issued the sequestration, the former tribunal may pronounce upon the validity of the seizure, though it have no power to order a release of the sequestration.

A sequestration, whether conventional or judicial, creates no lien or privilege. It is merely a conservative measure. The possession of the sequestrator is that of the party legally entitled to it ; and in all cases the party against whom it has been obtained, may release the property, by giving bond with surety.

No privilege or lien is created on the fees of office due to a sheriff, by his official defalcations. The debts due to him, in whatever amount, form, together with his other property, a common fund, out of which all his creditors are to be paid.

APPEAL from the District Court of the First Judicial District,

Buchanan, J. This was an action against Hozey and J. M. Bach, on two promissory notes.

BULLARD, J. The plaintiffs having obtained a judgment, caused a writ of *feri facias* to be issued against the defendant, Hozey, in virtue of which the sheriff levied, on the 5th of January, 1841, upon his books; and further proceedings were stayed. An *alias feri facias* issued afterwards, upon which the sheriff returned that he had seized "in the hands of Frederic Buisson, judicial sequestrator, the goods and chattels, lands and tenements, moneys, effects or property of any kind, which he might have in his possession, or under his control, belonging to the defendant, to an amount sufficient to satisfy this writ, and particularly any money he might now or hereafter have in virtue of his office as judicial sequestrator, of which seizure nothing came into the hands of the sheriff," &c.

The plaintiffs, thereupon, proceeded to propound interrogatories to Buisson, as garnishee, in pursuance of the provisions of the act of 1839. The first interrogatory related to the amount of money or evidences of debt which the garnishee had in his possession or under his control, belonging to the defendant, Hozey, or in which he had an interest at the time the process was served. To this the garnishee answered: that as judicial sequestrator, appointed by the Commercial Court, he had collected, on the 12th of April, 1841, (the date of the service,) \$1532 96 out of the fees of office due to C. F. Hozey, late sheriff of the parish of Orleans; that in his said capacity, he had been put in possession of a part of the official books of said Hozey; that it was impossible for him to state particularly the amount of money due to Hozey; and that he was authorized to collect fees of office due to him.

This is the substance of the only answer of the garnishee, which it is material to notice in this case, inasmuch as it discloses the amount received by him, and the capacity in which it was received.

In addition to the answer of the garnishee, he appeared by counsel, and filed an exception to the jurisdiction of the District Court in relation to the property belonging to Hozey, which the respondent had in his possession, said property having been previously seized, as he alleges, by the Police Jury of New Orleans and others, and before it was put into his hands by mandate of the

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Commercial Court, in the case of *The Inhabitants of the Parish of Orleans, represented by the Police Jury v. Hozey and his Sureties*.

This exception to the jurisdiction of the District Court in the premises was overruled, and Buisson, as judicial sequestrator, has appealed.

We are clearly of opinion, that Buisson, the garnishee, has no legal capacity to represent the plaintiffs in the case referred to in the Commercial Court, and that the rights of those plaintiffs and the Bank of Alabama to the fund levied upon, cannot be finally adjudicated upon without making the former parties. The question must be regarded only as it concerns the plaintiffs and Buisson, in his character as sequestrator, under the appointment of the Commercial Court, and is not in truth a question of jurisdiction, either in reference to the character of the parties or the subject matter of the controversy. The question presented by the record appears to us to be merely, whether the fund levied upon in the hands of Buisson, be subject to seizure by the creditors of Hozey not parties to the other suit? If the sequestration ordered by the Commercial Court has not placed that fund beyond the reach of other creditors, then the seizure must be maintained, although it may not avail the seizing creditor without a release of the sequestration, which the District Court has no power to order. That court was certainly competent to pronounce upon the question, without reversing or annulling the judgment or order of the Commercial Court; for the legal effect of the sequestration upon the property sequestered, must depend upon the law, and not upon the order of the court.

The facts appear to be, that at the suit of the inhabitants of the parish of Orleans represented by the Police Jury, in the Commercial Court, the books and papers of Hozey, as late sheriff, were sequestered, together with all the fees of office due to him in that capacity; that Buisson was appointed sequestrator, with authority to collect the moneys due to Hozey in his official character, and to institute suit upon his bond against his sureties. Under this appointment the garnishee had collected the sum admitted to be in his hands. The question then is, whether that fund is liable to be seized by a judgment creditor of Hozey, whose debt did not

originate in the misfeasance of the late sheriff, and who is not, as styled in the record, an *official creditor*.

It was long since settled, that a sequestration creates no lien or privilege. It preserves things *in statu quo*, and is merely a conservative measure. The possession of the sequestrator is that of the party legally entitled to it. In all cases the party against whom it is obtained may release the property by giving bond with surety, and the condition of the bond is, that the property shall not be sent out of the jurisdiction of the court, that improper use shall not be made of it, and that it shall be faithfully presented after judgment, in case restoration is decreed to the plaintiffs. 1 Martin, 79. 6 Martin, N. S. 476. 10 Martin, 473. Code Pract. art. 269, *et seq.* 279, 280.

In this respect it seems immaterial whether the sequestration be conventional or judicial. The judicial sequestrator is the *public officer provided by law* to execute the orders of the judge. Civ. Code, art. 2941, *et seq.* 2950.

The proceeding had in the case of *The Police Jury v. Hozey*, was merely, as it relates to the fund in question, a sequestration, and not a seizure, either as a means of bringing the defendant into court, (which could not be done, as was held in the case of *Stockton v. Hasluck*, 10 Martin, 472,) or in execution of a judgment. It is, therefore, a simple conservatory measure, which confers no rights which did not exist before.

We are not ready to admit that what are called the official creditors of the ex-sheriff, are entitled to be paid by preference out of the fees due him for official services. They alone, it is true, have a right to recover against the sureties on their official bond; but that right does not result from the sequestration, nor from the order of the Commercial Court, but from the obligation contracted by the surety to respond for the official conduct of the sheriff. It is not a privilege, but an exclusive right in which the ordinary personal creditors of Hozey can never participate. All the debts due to Hozey, on whatever account, together with his other property, form a common fund, out of which all the creditors are to be paid, according to their legal rank, independently of this sequestration; in other words, we are of opinion, that the fees of office due to the ex-sheriff are not specially affected, either by law

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or this sequestration, to pay the claims upon him arising out of his official defalcations. The law has declared no such preference or privilege, and we cannot create one.

We are not now called upon to say in what manner the attaching creditor in the present case is to proceed in order to be paid out of the fund attached, or whether it can be done without calling in the party at whose suit it was sequestered. Our attention is directed exclusively to the question growing out of the exception, to wit, whether the fund was liable to the plaintiffs' attachment or seizure, and, in this respect, we think the District Court did not err in overruling the exception.

The judgment is, therefore, affirmed, with costs, and the case remanded for further proceedings according to law.

Chinn and Slidell for the appellants.

Eyma, for the defendants.

PIERRE ACHILLE HARDY v. FRANÇOIS GARDERE.

Action by the endorsee of a draft, drawn by the Trustees of a College, on the Treasurer of the State, for a portion of the annual appropriation for the use of the College, payable, to J. N., or order, and endorsed "J. N., Treasurer." Plaintiff having paid part of the draft to J. N. in cash, and the balance by acceptances of drafts, drawn on him by a firm of which J. N. was a partner, and J. N. having shortly after become insolvent, on an answer by the Trustees, cited in warranty, alleging that plaintiff had received the original draft, knowing that it had been entrusted to the Treasurer of the College for collection, for the use of the College, and not to be negotiated: *Held*, that the draft was, on its face, an official paper, and that the plaintiff having connived with J. N. to divert its amount from the use of the College, could not recover in an action against the Treasurer of the State as acceptor, or the College as drawers of the draft.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. This is an action against the State Treasurer, by the endorsee of a draft of the Trustees of the Louisiana College, drawn on him in favor of the Treasurer of the Board of Trustees for the sum of \$3750, for one quarter of the yearly appropriation

made by the legislature. The draft is payable to Jos. Nichols, or order, and endorsed "Jos. Nichols, Treasurer."* The defendant pleaded as an exception, that he was not suable on a claim for money to be paid out of the treasury of the State. This exception was withdrawn, and the defendant answered that the Louisiana College was the real party in this cause, and had directed him to forbear paying the draft, and he prayed that it might be called in warranty.

The College came in and pleaded the general issue, averring that they had directed the defendant to forbear paying the draft; that the plaintiff received a transfer of the draft, well knowing that it had been officially entrusted to the Treasurer of the Board, not for the purpose of negotiation, but for that of receiving its amount from the Treasurer of the State, or procuring it to be received for the use of the College, and that he unfaithfully, with the assistance of the plaintiff, negotiated it, and converted the proceeds to his own use.

The plaintiff had judgment against the defendant, and he against the College; and the two latter are appellants.

The testimony shows that the plaintiff paid to Nichols, on receiving the draft, \$1600 in cash, and accepted two drafts drawn on him by Nichols & Lathrop, a firm of which Nichols was a member, for the balance, at short dates, to wit, one for fifteen hundred, and the other for five hundred dollars. That shortly after, Nichols surrendered his property to his creditors, and was discharged from the service of the College. That the plaintiff had there-

* The draft on which this suit was brought, is in the following words :

\$3750.

Jackson, La., March, 1841.

F. GARDERE, Esq., Treasurer of the State of Louisiana :

On the 1st of April next, (1841,) pay to Jos. Nichols, or order, three thousand seven hundred and fifty dollars, being amount due said College for quarter commencing 1st January, and ending 31 March, 1841, of the appropriation of fifteen thousand dollars per annum, by act passed and approved March 31st, 1835.

THOMAS BUTLER, Presid't Board of Trustees.

S. M. BRIAN,	} Trustees.
JNO. E. PHARES,	
ANDREW AITCHISON,	

(Endorsed) Jos. NICHOLS, Treasurer.

tofore received similar drafts from Nichols, which he paid in a like manner, by a partial payment in cash and by crediting his firm for the balance, or accepting his drafts. It was farther shown, that another house in New Orleans had dealt with Nichols for several drafts of the College on the State Treasurer, in the same manner as the plaintiff.

[It was alleged in the petition, and proved on the trial, that when the draft was presented to the defendant for payment, he promised to pay it as soon as there should be an amount in the treasury to pay the same ; and it was admitted there were funds sufficient before the institution of the suit.]

Roselius, Attorney General, for the appellants.

I. W. Smith, for the plaintiff. The instrument sued on is a negotiable bill of exchange. The words "being an amount due said College," &c., on the face of the bill, is a mere statement of the consideration. The insertion of words to point out the consideration, will not vitiate a bill. *Chitty*, 159. The insertion of such words was for the purpose of informing the drawee of the reason for drawing the bill, or to increase the confidence of third persons in it, by directing their attention to the nature of the debt for which it was drawn. The draft is payable to "Jos. Nichols, or order." If Nichols was but the agent of the College to collect the amount of the draft, why were the words "or order" made use of, which are peculiar to negotiable instruments ? The endorsement by Nichols, as Treasurer, cannot change the nature of the obligation, as apparent on its face. The payee of a bill has a right to transfer it to any person, for value, before maturity. *Chitty*, 220. The plaintiff, relying on the promise of defendant to pay the draft as soon as there should be funds in the treasury, is entitled to recover against him. *Chitty*, 159, n. 1. *Bayley*, 20. *Freeman v. Otis*, 9 Mass. 260. *Boyce v. Russell*, 2 Cowen, 444. The evidence shows that other drafts, of a similar character, were entrusted to Nichols, who negotiated them. If any loss be sustained by the College, it must be attributed to the negligence of the trustees in allowing their Treasurer to sell their drafts in the market.

MARTIN, J. It appears to us that the court erred. Had the Treasurer of the State been the holder of a note of the firm of

which Nichols was a member, of the same amount as the draft drawn by the College, and had he, taking Nichols' receipt thereon, surrendered to him the note of his firm, this would not have been a payment to the College, for the Treasurer would have acted faithlessly, knowing that Nichols' possession of the note was the possession of the College, of which he was Treasurer, and that he was entrusted with it to receive the amount for the use of the College, and not to apply its proceeds to the discharge of his own debt, or those of his firm. Suppose a tutor to receive his own note, giving to the payee a receipt for a sum equal to the amount of the note, in discharge of a claim of the minor against the payee of the note, can there be any doubt that, on the insolvency of the tutor, the minor's claim against the payee would not be considered as extinguished by his surrender of the tutor's note? The draft sued upon was, on its face, an official paper; an order from the President and three Trustees of the College on the Treasurer of the State, for one quarter of the annual appropriation of the legislature in favor of the College; and the plaintiff evidently appears to have been conscious, that the authority of the payee was an official one only, which required his official signature on the back of the draft. He thereby connived with Nichols, in assisting him to divert the funds of the College from the use of the institution, and in applying them to his own use, or that of a firm of which he was a member.

Several of the witnesses have deposed that they never knew the College to make any objection to Nichols' negotiating, for his own use, or that of his firm, the drafts of the College for the legislative appropriation. In order that this circumstance may have any weight, it ought to have been shown that the Trustees, or some of the officers of that institution had knowledge of this misapplication of the drafts.

It is, therefore, ordered, that the judgment of the District Court against the defendant, and in his favor against the College, be annulled; and proceeding to give such a judgment as, in our opinion, ought to have been given below, it is ordered that there be judgment for the defendant with costs in both courts.

FRANCIS TOMES v. ABRAHAM MONTANYE.

Action against defendant as drawer of certain notes and indorser of others. Plea of prescription, and proof of promise by defendant, within the time necessary to prescribe, to give his notes for the debt, payable at a short time ; but no evidence of notice of the protest of the notes on which he was endorser, nor that he was aware of his discharge at the time of the promise : *Held*, that defendant was bound for the notes of which he was drawer, but discharged as to those on which he was endorser. To render promises to pay binding on an endorser, who has been discharged, it must be proved that he was aware of his discharge, at the time of the promise.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Rawle*, for the plaintiff.

Elwyn, for the appellant.

MARTIN, J. The defendant is appellant from a judgment on several promissory notes, on which his name appears as drawer or endorser. He relies on the pleas of the general issue, and prescription. The appellee has prayed for an amendment of the judgment, so as to allow him all the interest on the notes sued on. The defendant not having specially denied his signature, can only be assisted by the plea of prescription, in regard to the notes of which he was the drawer. The plaintiff on this part of the case relies on the deposition of Leech, who testifies that a few months before the inception of the present suit, as agent of the plaintiff, he called on the defendant for payment of the notes sued on, who declared that he was unable to pay them, and could not do it without injury to his other creditors ; but, at last, promised to give his notes at six and twelve months ; the witness thereupon accepted the promise, on the condition of its being approved by the plaintiff, who when written to gave his assent, which was communicated by the witness to the defendant, who declined to give his notes. The judge *a quo* did not err in concluding that the defendant's promise to give new notes, waived the prescription as to the notes drawn by himself. With regard to those of which he was endorser, his counsel has urged that judgment was erroneously given against him, there being no evidence of notice of the protest. The judgment informs us that the plaintiff proved all the allegations of his petition. We have looked in vain for proof of notice in the record. But the plaintiff's counsel urges that none

was required, as the defendant acknowledged the debt and promised to pay all the notes ; that it is, therefore, to be presumed that he had knowledge of every thing, and that if no notice was given, it was for him to show it. He has added that " it is a general rule that an admission of the party's liability on the bill, *made with a knowledge of the facts*, will supersede the necessity of the usual regular proof in detail. Such an admission operates as presumptive evidence that all things have been *recte acta*, or perhaps, in some cases, even as a waiver by the party of any irregularity as to presentment, notice, &c. 2 Starkie on Evid. 166. See Chitty on Bills, p. 538. We have been referred to a case decided in this court, *Williams v. Robinson*, 13 La. 421, which we find recognizes the general rule. It was an action against the drawer who had made a partial payment.

Starkie speaks of a promise to pay, made with a knowledge of the facts, to wit, of the irregularities in the protest or notice, or the absence thereof. In the present case, there is not the least tittle of evidence from which it may be inferred that the defendant made the promise with the knowledge that the absence or irregularity of the notice had discharged him. We have always held, in regard to such promises, that the plaintiff is bound to prove that the defendant had knowledge of such absence or irregularity when he made the promise.

It is, therefore, ordered that the judgment of the Commercial Court be annulled, and that the plaintiff recover from the defendant two hundred and ninety-three dollars and twelve cents, with interest at five per cent, from the 22d of May, 1841, with costs in the court below, those of the appeal to be borne by the plaintiff and appellee ; and that there be judgment of nonsuit with regard to the six endorsed notes mentioned in the petition.

THE STATE v. THE JUDGE OF THE COURT OF PROBATES OF NEW
ORLEANS.

The domicile of the tutor is that of the minor. The Court of Probates of the parish in which the minor has his domicile, is the proper tribunal to order a family meeting of the relations or friends, to determine questions affecting the interests of the minor.

APPLICATION for a mandamus to the Judge of the Court of Probates of New Orleans.

BULLARD, J. On the 5th instant an application was made to this court by Thérèse Bénit, widow of Michel Halphen, stating that she is the legitimate tutrix of her grandson, Gabriel Fuselier, appointed by the Court of Probates of the parish of St. Martin; that since the death of said minor's father he has ever resided with her, in the parish of New Orleans, in which she was and is domiciliated; that he has an interest in some real estate of which it would be advantageous for him that a partition should be obtained, and in some other of which a sale would be proper; that she applied to the judge of the Court of Probates of the parish of New Orleans, praying that he might order a family meeting of the relations or friends of said minor, in presence of his under-tutor, to deliberate on the matters in her petition, and also to determine whether it would not be practicable, and at the same time more advantageous for said minor, to sell his undivided part in said property without suing for a partition of the same. The judge of the Court of Probates declined to act on this petition, being of opinion that the family meeting prayed for, ought to be ordered by the Court of Probates of the parish of St. Martin, by which the tutrix was appointed. On an affidavit of these facts, her counsel, under the authority of *The State v. Judge Bermudez*, 14 La. 478, obtained a rule on the judge of the Court of Probates, to show cause why a mandamus should not be issued, commanding him to take cognizance of the petitioner's application, and to act thereon. The cause shown being deemed insufficient, the rule was made absolute. On an affidavit that the judge did not forthwith obey the mandate of this court, by ordering the family meeting, but directed a rule to be served on the under-tutor who resides in the parish of St. Martin, commanding him to show cause

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why the prayer of the petitioner should not be granted, the counsel has moved us that a writ of mandamus be issued, commanding the judge to order the family meeting as prayed for.

Bermudez, Judge of the Court of Probates, showed cause. 1. The court which appointed or confirmed the tutor has exclusive jurisdiction over his acts, until the expiration of his tutorship and final discharge. 2. A family meeting can only be held in the parish in which the deceased parent was domiciliated, and only convoked by the court which appointed or confirmed the tutor.

Janin, for the applicant. The question is the same as that presented in the case of *The State v. Judge Bermudez*, 14 La. 478, which was decided after repeated arguments and much consideration.

BULLARD, J. It is ordered that a peremptory mandamus be issued, commanding the judge of the Court of Probates for the parish and city of New Orleans, forthwith to order a family meeting to be convoked as prayed for.

WILLIAM ROLEY GLOVER and another v. SAMUEL T. McALLISTER and others.

The master of a ship which arrived at New Orleans, during an epidemic yellow fever, bound to Natchez. contracted for a fixed price, with the owners of a steamer, to tow his vessel to the latter place, and to start from New Orleans on the evening of the succeeding day. The steamer could not be got ready sooner. Influenced by the apprehension of his passengers for their safety, the master notified the owners of the steamer in the evening of the day on which the contract was made, that he should be compelled to leave in tow of another boat which could start at once. In an action on the contract: *Held*, that from the peculiar circumstances of the case, plaintiffs were entitled to recover only the amount of damage actually sustained, and not the whole amount of profit which they might have derived from the performance of the contract.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

I. W. Smith, for the plaintiffs, prayed that the judgment of the lower court might be amended, so as to allow the plaintiffs the

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whole amount stipulated in the contract. Citing Civ. Code, 1298. Pothier, Contr. de Louage, No. 141-3.

Janin, for the appellants.

MARTIN, J. The defendants are appellants from a judgment by which the plaintiffs have recovered damages to the amount of \$350, on the breach of a contract by the plaintiffs, as owners of the steamboat Bunker Hill, to tow the ship Ambassador, of which one of the defendants is master, and the others are part owners, from New Orleans to Natchez. The plaintiffs and appellees have prayed that the judgment may be so amended as to allow them the full sum of \$900, claimed in their petition. The facts of the case are these: The defendant, Hall, master of the ship Ambassador, made an agreement, on the 12th of October, with the captain of the steamboat Bunker Hill, for the towing of the ship from New Orleans to Natchez. The steamer had, on her preceding voyage, broken a part of her machinery, and a new piece was then being made in a foundry at New Orleans, which was expected to be completed on Sunday morning, the 13th of October; her captain, therefore, said that he could not depart until the evening of that day. Captain Hall promised to pay for the towing of the ship \$900. On the evening of the same day, he wrote to the plaintiffs, that owing to the earnest solicitations of his passengers, he was compelled to depart; and he did so, the ship being towed by another steamer. The Bunker Hill was ready to start on Sunday evening, and actually did so on the Tuesday following. The Judge of the Commercial Court thought it his duty to reduce the claim of the plaintiffs to what he terms "naked damages," which we construe to be those actually sustained, without allowing for profits lost. The ship arrived at New Orleans with about thirty passengers, at a time when the yellow fever was raging in the city with great violence, and an hour's delay might have endangered the lives of the passengers and crew.* The appellants' counsel has contended that the extraordinary circumstances in which the master of the ship found

* It appears from a statement of the facts of the case made by the counsel of the appellants, that the Ambassador arrived about the 8th of October. The day of arrival is not shown by the evidence.

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himself, authorized a departure from rules made for ordinary cases ; that the plaintiffs ought not to suffer, nor be benefited by the distress of the people on board of the ship ; that any additional expense which the steamer might have incurred, ought to be charged to the defendants ; but that she would have incurred none, had she started, as the captain first intended, on Sunday evening : and that if the boat remained in the city until Tuesday, it was for her own benefit, and the owners were, no doubt, compensated by additional freight or passengers.

The counsel for the plaintiffs and appellees has urged that the stay of the steamer until Tuesday, was occasioned by the necessity of taking more freight, in consequence of the departure of the ship, and the impossibility of doing this on the Sabbath.

The judge *a quo* was of opinion, that, although the contract was, deliberately broken, it was so for reasons which are good and valid in themselves, although foreign to the contract, and we have felt no disposition to differ from him.

Judgment affirmed.

CHARLES DIDION v. MARTIN DURALDE and another.

A broker is entitled to no compensation, unless a bargain be effected ; and even in that event, has no claim for the reimbursement of his expenses.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The plaintiff is appellant from a judgment which rejects his claim for brokerage, and for some expenses alleged to have been incurred by him in his attempt to earn the brokerage. Villars, one of the defendants, is also appellant from a part of the judgment which allows to the plaintiff thirty dollars for the expense of a journey. Our attention is drawn to a bill of exceptions, taken to the refusal of the court to admit parol evidence to establish that an oral agreement between the plaintiff and defendants, relative to the sale on which he claims a brokerage, was to have been reduced to writing, but that the defendants, or one of them, refused so to

reduce it. The admission of the parol evidence was opposed on the ground, that neither the sale of immoveable property, nor the agency of the broker employed to effect it, can be proved by parol. A second bill of exceptions was taken to the rejection of a letter, offered as rebutting evidence; the court being of opinion, that the letter did not tend to rebut the defendants' testimony. There is a third bill of exceptions, taken by the defendants' counsel, to the admission of witnesses to establish the customary rate of brokerage on sales of real property, on the ground that the plaintiff, being a broker, is a mandatary, and ought to prove, not a custom, to establish his claim, but an agreement between him and the defendants as to his salary or remuneration.

Pepin, for the plaintiff. The plaintiff is entitled to a judgment against the defendants *in solido*, for his commission and expenses. Civ. Code, arts. 2991. That the sale was not effected, was owing to the fault of the defendants, who refused to comply with their contract, after the terms had been agreed upon. The court erred in refusing to admit the testimony of witnesses to show that the defendants had agreed upon the terms of sale, and that no written act had been executed in consequence of the refusal of one of them to abide by his agreement. A broker like other agents is entitled to his expenses. Art. 2991 of the Civ. Code is explicit on the subject, as to agents in general. Brokers are not excepted from its operation; and *eadem ratio, eadem lex. Ubi lex non distinguit, non debemus distinguere*. Civ. Code, arts. 2986, 2989. Agents of all kinds are entitled to recover the expenses incurred by their agency. Story on Agency, 335. 2 Livermore, 1—2 and 11—33. Pothier, Mandat, No. 68—79. Duranton, book 18, p. 269, § 264—268. See also Domat, Locré, &c.

Blache, contra. A broker is not entitled to a commission unless a bargain be effected. There was no evidence of the amount of the expenses claimed, or of their payment by the plaintiffs.

MARTIN, J. It has appeared to us perfectly unnecessary to act on these bills. The first and last relate to the plaintiff's claim of brokerage, and its rate; the second relates to the proposed terms of sale, and to the claim of the party, who proposed to purchase, to an exemption from the payment of one-half of the brokerage. The view we have taken of this case, on an examination of its merits,

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renders the correctness or incorrectness of the decision of the judge *a quo*, on any of these three bills, absolutely immaterial. On the merits, the record shows that the sale of the land was never effected, and a close examination of the evidence has satisfied us that, on the question of fact, the judge below did not err; and that he correctly concluded, that no brokerage is due in the case of a sale until it is actually effected. The plaintiff claims the reimbursement of the expenses incurred in advertising, procuring certificates from the Recorder of Mortgages, and on a journey. No evidence was offered of any advertisement or certificates of mortgage, and the expenses on these heads were correctly disallowed. The defendants complained that the expense of the journey was allowed. We think none were due. In the case of *Blanc v. The Improvement Bank*, very lately decided, *ante*, p. 63, we held that a broker employed to sell a house, whether he succeeds or not, is not entitled to the reimbursement of money spent in hack, cab, or horse hire, in looking for a purchaser. In the same case we held that, in the contract of brokerage, nothing is to be paid, unless a bargain be effected.

It is therefore ordered, that the judgment be annulled; and proceeding to give such a judgment as in our opinion ought to have been given below, it is ordered, that there be judgment for the defendants, with costs in both courts.

DANIEL TREADWELL WALDEN v. THE CITY BANK OF NEW ORLEANS.

By the laws of this state, a contract tainted with usury, is voidable only as to the usurious interest. and valid as to the principal

An offer of restitution must be proved, to maintain an action of rescission.

Sect. 3 of the act of 25th March, 1831, authorizing the court, in case of the dissolution of an injunction, to condemn in the same judgment, the plaintiff and his surety, jointly and severally, to pay to the defendant interest on the amount of the judgment and damages, applies only where judgments have been enjoined. In other cases, the defendant must be left to his remedy on the bond.

APPEAL from the District Court of the First District, *Buchanan, J.* This was an action to rescind a contract of loan, secured by mortgage, entered into by the plaintiff with the City Bank of New Orleans, and, in the mean time, to enjoin the latter from taking any summary measures to enforce its re-payment. The petition alleges, that the defendants claim to be creditors of the petitioner for upwards of \$200,000, for a loan pretended to have been made in good current money, and to hold a mortgage on property of double that value to secure its payment; and that they have threatened to enforce its payment by summary measures. The petitioner avers that the contract, and acts of mortgage, made in pursuance thereof, are null. He represents, that, at the suggestion of the President of the City Bank, he applied to that institution for a loan of \$200,000, to be secured by mortgage, and to be payable in instalments, at such periods as his income would enable him to do. That the Bank agreed to make the loan, to be repaid at one, two, three, four, and five years, on the condition that he would deduct therefrom an amount then due by him to the Bank, as well as a discount on the loan at the rate of eight per cent, and take at par in lieu of money, certain bonds of the Second Municipality of New Orleans, held by the Bank. That the bonds were for \$1000 each, and becoming due many years after the last instalment of his debt would become due to the Bank, and were then and still continued to be worth in the market only from seventy to eighty cents on the dollar, the Bank itself having received them at twenty per cent discount. He avers that the contract and acts of mortgage were in violation of the charter of the Bank; that the consideration was usurious and unlawful, the agreement having been entered into by the Bank for the purpose of obtaining a higher rate of interest than was allowed by its charter; that the statement in the acts that the loan was made in "good current money," was intended to disguise the truth, no money whatever having been received by him; and that the only consideration for the obligations and mortgages, was the receipt of one hundred and thirty-eight bonds of the Second Municipality, and a credit for the debt then due by him to the Bank. He alleges that the Bank, contrary to law, charged interest on the bonds from the 1st of June, 1839, till the time of their delivery, at six per cent, though the period was

less than three months. The petitioner concludes by averring that he apprehends that the Bank will proceed by the most summary means known to the law, to enforce the payment of the amount secured by mortgage; and with a prayer, for an injunction to restrain the defendants from any such proceeding, and for a rescission of the sale.

The defendants excepted to the petition, on the ground that the plaintiff could not claim a rescission of the contract, without having first tendered to them the bonds, with the interest which he had collected on them, and the other evidences of the original debt, the existence of which he had admitted. In case the exception should be overruled, they answered, that the bonds and mortgages were executed by the plaintiff in consideration "of a pre-existing" debt, and of one hundred and thirty-eight bonds of the Second Municipality of New Orleans, endorsed by the defendants; averred that the contract was not usurious or illegal, nor in violation of the charter of the Bank; and prayed, that the petition might be dismissed, the injunction dissolved, and for a judgment against the plaintiff and his sureties in the injunction bond, *in solido*, for \$20,000, &c.

The injunction was dissolved, and judgment "in pursuance of the act of 1831, against the principal and sureties in the injunction bond, *in solido*, for ten per cent per annum on the amount of the bond, as interest and damages," from which the plaintiff appealed. The exception was subsequently sustained by the court below; and from a judgment as in case of nonsuit, there was a second appeal.

Grymes, for the appellant. 1. This is an action to annul a mortgage given by the plaintiff to the defendants, and the question is, could an injunction properly issue to stay proceedings on the mortgage pending the action to annul it?

The causes of nullity set forth in the plaintiff's petition are, that the mortgage was taken by the defendants in fraud, and contrary to the express prohibition of law.

On a motion to dissolve an injunction on the face of the petition, all matters alleged are to be taken as true. 8 Mart. N. S. 396. 4 La. 293, 285. 11 Ib. 482. If the facts set forth in the petition be

taken as true, the question is narrowed down to the mere power of the court to award the writ of injunction in such a case.

On general principles a stronger case could not well be propounded, and the legislation and jurisprudence of this state most clearly authorize it. The Code of Practice after enumerating a long list of cases wherein an injunction may be issued, concludes by declaring that, "besides the cases above mentioned, courts of justice may grant injunctions in *all other cases*, where it is necessary to preserve the property in dispute during the pendency of the action, and to prevent one of the parties, during the pendency of the suit, from dilapidating the same, or *from doing some other act injurious* to the other party. Art. 303.

This is broad enough to cover any case where the injurious consequences of the act are apparent. Executory process on a mortgage for two hundred thousand dollars must produce great and irreparable injury to the party, and most uselessly too, if the mortgage be null and void.

2. The remedy by injunction is not confined to cases where judgments have been rendered, or process has been already issued. Even on this restricted and narrow ground, the injunction should be sustained in this case.

A mortgage by public and authentic act, importing confession of judgment, is to all intents and purposes a judgment, in every sense of the term. It only requires, for its complete execution, the issuing of the executory process, which is *ex parte* and without notice or citation, as a judgment rendered in court requires the issuing of a *feri facias*. The last may be enjoined, and no distinction can be drawn between the two cases, on principle, convenience, or necessity.

This is an action to annul the mortgage or judgment confessed; and the execution of the judgment, alleged to be a nullity ought to be stayed while the action is pending. *Gurlick v. Reece*, 8 La. 101.

3. If this be not a judgment, which may be enjoined, then the judgment of the District Court, is erroneous for another reason. It not only dissolves the injunction, but proceeds to assess damages against the plaintiff and his sureties on the injunction bond, as in a case within the purview of the act of the 25th of March, 1831. The third section of that act, which gives the power to the court

to assess the damages, is applicable only to cases of injunction to stay proceedings on *judgments*. Such was the opinion of this court after elaborate argument and great deliberation, in the case of *Borie v. Borie et al.*, 5 La. 89.

This construction is further strengthened by the third sect. of the act of 1833, passed with reference to the opinion of this court in the case last cited. The operation of this law is, by this act, expressly confined to injunctions to stay proceedings on judgments. The two acts are *in pari materia*, and must be taken together, and so taken, are conclusive on this point. They are acts of great severity, and must be strictly and rigorously construed. *Mc-Millen v. Gibson et al.*, 10 La. 519. *Fisk v. Hart*, 11 La. 481. If this case be considered as that of a judgment, the injunction ought not to have been dissolved, the facts stated in the petition being taken for true; if not, then the dissolution and judgment against the plaintiff and his sureties is erroneous. Under any view of the case, on the final hearing the injunction must be sustained for part of the sum demanded, and, consequently, there can be no claim for damages. 11 La. 483.

The judgment on the merits was equally erroneous. The defendants attempt to place the case upon the footing of an application to a court of equity for relief against the payment of usurious interest. This is a palpable error. Were the contract in itself lawful, and relief sought against usurious interest only, a court of equity would only grant relief on certain terms. For the distinction between the case of a lender seeking to enforce a contract unlawful in its nature, and that of a borrower seeking relief from the payment of usurious interest, see 1 Story's Equity, 299, 300, and 301. See also 3 Wendell, 573.

The only question in this case is, whether the mortgage in question was executed in a lawful manner for a lawful purpose, or is such a contract as can be enforced in a court of justice? On this point, see *Astor v. Price*, 7 Mart. N. S. 408. It is clearly prohibited by the 6th and 18th sec. of the charter of the Bank. All contracts against law are void. Civ. Code, arts. 1757, 1772, 1885-7, 1889, 1890, 1895, 2015. *Milne v. Davidson*, 5 Mart. N. S. 409. The whole matter is ably discussed, and the principles of law clearly laid down by the Supreme Court of the United States, in the

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case of *The Bank of the United States v. Owens et al.*, a case exactly like the present. 2 Peters, 527. See also 17 Mass. 257. 4 Peters, 410. 9 Ib. 378.

The amount for which the plaintiff may be bound, is not now before the court. When the defendant shall think proper to pursue his claim in a proper shape, the inquiry will then properly arise. The only question under the pleadings in this case, as it now stands, is the validity of the mortgage.

Lockett, Micou, and L. Peirce, for the defendants. A party demanding the rescission of a contract, must return, or offer to return the consideration received by him. The plaintiff's demand is one, which in countries governed by the common law of England, could only be heard in a court of equity. It is a settled principle in those courts, that relief will never be extended to a party against his own contract, without exacting from him strict justice to his adversary. In *Morgan v. Schermerhorn*, 3 Paige's Ch. Rep. 546, Walworth, Chancellor, says: "As a general rule, a party who comes here to seek relief against an usurious contract, must pay, or offer to pay the amount actually due, before he will be entitled to an *injunction*, or to an *answer* to the alleged usury." See *Livingston v. Harris*, 3 Ib. 532. *Fanning v. Dunham*, 5 Johns. Ch. R. 142. *Beach v. Fulton Bank*, 3 Wendell, 584. *Vernon*, 170, 173. *Fitzroy v. Gwillim*, 1 Term Rep. 154. *Mason v. Gardner*, 1 Fonblanque's Equity, 25. *Vent v. Osgood*, 19 Pickering, 577.

All our courts are courts of equity. The Code enjoins them, "in the absence of express legislation to proceed and decide according to equity," (art. 21); and equity is declared to be "founded in the christian principle not to do unto others that which we would not wish others should do unto us, and on the moral maxim of the law, that no one ought to enrich himself at the expense of another." Art. 1960.

The return or tender of the consideration received by the plaintiff, is a condition precedent to his right to be heard, and as his petition does not allege that he has returned the consideration, and does not tender now to return it, it contains no cause of action, nor ground for injunction.

A distinction has been attempted to be drawn between a con-

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tract for usurious interest made by an individual, and a contract, by a corporation, for a higher rate of interest than its charter allows. This distinction is urged upon the ground that a corporation is the creature of the law; that it has and can exercise no powers, save those expressly conferred by the law which creates it; and that any act, or contract in which it exceeds the strict letter of its charter, is absolutely void.

It is true that the powers of a corporation are limited by the law which creates it, and that it cannot contract in reference to objects not contemplated by its charter. But in reference to all subjects within the scope of the powers granted to it, and of the purposes for which it was created, it may act and contract precisely like a natural person; in reference to those powers, and in the accomplishment of those purposes, its acts are judged by the same rules, guarded by the same sanctions, and liable to the same penalties, as the acts of individuals in similar cases, and to none other.

Blackstone speaks of corporations as "artificial persons." Chancellor Kent defines them to be "bodies politic," acting in several respects as a "single individual." Our own Code says, that a corporation is "an intellectual body, created by law," and "which for certain purposes is considered as a natural person." When established, "they are substituted for persons," and the enumeration of their powers, in article 424, shows, that with respect to the objects of their association, their rights and privileges are identical with the rights of natural persons over the same objects.

Corporations are subject to the general laws of the land. All laws regulating contracts and rights of property—in short all laws save those, *ratione materiæ*, inapplicable to the nature of corporations, apply as well to them as to natural persons. Angell & Ames, p. 142. If then a corporation be permitted by its charter to buy and sell, it may buy and sell every thing which may be bought or sold by a natural person.

By the Civil Code, art. 2895, "legal interest is fixed at the following rates, to wit: at five per cent, on all sums, which are the subject of a judicial demand, whence this is called judicial interest.

"And on sums discounted by banks, at the rate established by their charters.

"The amount of conventional interest cannot exceed ten per cent."

The charter of the City Bank provides, that it "may discount notes at a rate of interest not exceeding eight per cent."

The language of the law, in reference to individuals and to corporations, is then the same. Both are simply forbidden to exceed a prescribed rate.

The consequences of a violation of the law must be the same in either case. Corporations may be restricted in the exercise of certain rights, and extraordinary penalties may be denounced against them, either by the general law, or by their charters. The law might enact that a certain contract, if made by a corporation, should be null; it might withhold the infliction of such a penalty, upon a similar contract, by an individual. But if the law has made no such distinction, the courts have no power to make it.

The cases relied on by the counsel for the plaintiff draw no such distinction as he has contended for. The case of the *Bank of the United States v. Owens*, 2 Peters, decides simply the point, that a contract prohibited by law will not be enforced. The learned judge, in citing his numerous authorities, urges only this general proposition. His object was to establish that the prohibitions of the law will be as strictly enforced as those of morals; that no difference will be recognized in a court of justice, between *malum in se* and *malum prohibitum*. The same remarks are applicable to the opinions delivered in the case of *Craig v. The State of Missouri*, 4 Peters, and *Armstrong v. Toler*, 11 Wheaton.

The distinction is unfounded. The alleged violation of the charter consists in the reservation of a rate of interest exceeding eight per cent. A similar violation of the law by an individual would be denominated usury.

As to the alleged usurious character of the contract. It is not pretended that the contract was usurious on its face; the plaintiff relies on a secret illegality, covered by a contract valid in form. It is then incumbent on him to prove the violation of the law, and the intention to violate it. Neither will be presumed by the courts. *Lloyd v. Scott*, 4 Peters, 224. "It is an admitted principle, that

the courts will not presume a contract usurious, without satisfactory proof." 1 Wash. 368. Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; for the intent is apparent; *res ipsa loquitur*. But where the contract is, on its face, for legal interest only, then it must be proved that there was some corrupt agreement, or device, or shift, to cover usury; and that it was in the full contemplation of the parties. These distinctions are laid down and recognized so early as the cases of *Button v. Downham*, Cro. Eliz. 642; *Bedingfield v. Ashley*, Ib. 741; *Roberts v. Tremayne*, Cro. Jac. 507. The same doctrine has been acted upon in modern times, as in *Murray v. Harding*, 2 W. Bla. 859; where Gould, Justice, said that the ground and foundation of all usurious contracts is the corrupt agreement; in *Hoger v. Edwards*, Cowp. 112; in *Hammet v. Fea*, 1 Bos. & Pull. 144; in *Doe v. Booch*, 3 Barn. & Ald. 664; and in *Solarte v. Melville*, 7 B. & Cress. 431.

"The principle would seem to apply to the prohibition in the charter of the Bank. There must be an intent to take an illegal interest, or, in the language of the law, a corrupt agreement to take it, in violation of the charter; and so it was stated in the plea in the case of *The Bank of the United States v. Owens*, 2 Peters, 527. The *quo animo* is therefore an essential ingredient in all cases of this sort." Story, J. *Bank of the United States v. Waggener et al.*, 9 Peters, 399.

Testimony was offered to prove that the current value of the bonds was below par; conceding this to have been the case, (though the contrary is established,) it does not follow that the loan was usurious. "If the application," says Story, J., "be not for a loan of money, but for an exchange of credits or commodities, which the parties, *bona fide*, estimate of equivalent values, it seems difficult to find any ground on which to rest a legal objection to the transaction. Because an article is depreciated in the market, it does not follow that the owner is not entitled to demand or require a higher price for it, before he consents to part with it. He may possess bank notes, which to him are of par value, because he can enforce payment thereof, and for many purposes they may pass current at par, in payment of his own debts, or in

payment of public taxes, and yet their marketable value may be far less. If he uses no disguise—if he seeks not to cover a loan of money under the pretence of a sale or exchange of them, but the transaction is, *bona fide*, what it purports to be, the law will not set aside the contract, for it is no violation of any public policy against usury." *Bank of the United States v. Waggener et al.*, 9 Peters, 401.

And in conformity with these views, the court decided that the discount of Owens' note by the United States Bank, in notes of the Bank of Kentucky, when these notes were at a depreciation of from 33 to 40 per centum, was not necessarily usurious or illegal.

The proof of illegality must then be sought for elsewhere in the record. "Such an exchange," says the court in the same case, "is not *per se* illegal, though it may be so, if it is a mere shift or device to cover usury." The evidence shows that there was no such illegality in this case.

In England, and in some of the United States, usury avoids the whole contract. The penalty is expressly imposed by statutes. 2 Peters, 538. In the learned opinion of Judge Porter, pronounced in the case of *Hermann v. Sprigg*, 3 Mart. N. S. 191, the Spanish law on the subject is ably collated. That law declares that "contracts and public acts in which usury intervenes, are null." The construction placed upon it by the courts, and adopted by the judge in the case cited, was, that the contract for the interest only was void, and that the principal, the actual amount of the loan, might be recovered.

But the Spanish law has been repealed. Neither our Code, nor any statute in force, pronounces an usurious contract void, or imposes any penalty upon the reservation of illegal interest. The law now simply declares, that the rate of conventional interest shall not exceed ten per cent, and the rate of bank interest, that prescribed by the charter. Up to the limit prescribed by law, the contract is good—void for the excess. And so has this court decided in the case of *Millaudon v. Arnaud*, 4 La. 545. "The laws of Spain which affixed, as a penalty for lending money at a higher rate than that permitted by law, the loss of *the whole of the interest stipulated for*, have been repealed, and the decisions

of the court, under those laws, can have no application to a case arising under the provisions of our Code. If, therefore, we come to the conclusion that the charge of two and one-half per centum for acceptance was usurious, we could only *reject* that item. The agreement to pay ten per centum interest would be unaffected by it."

In the case of *D'Aquin v. Coiron*, 3 La. 393, and *Milloudon v. Flower*, 6 La. 707, the rule of the Spanish law was applied by the court, because in both cases the contracts in question had been made before the repeal of the Spanish law. The case in 4 La. already cited, has never been overruled. The opinion was pronounced by Judge Porter, who had before so thoroughly examined the Spanish laws on the subject, and may be considered the law of Louisiana.

By the ancient Roman law, usury was punished more rigorously than theft. By the French law, the usurer was punished for the first time by a public and ignominious acknowledgment of his offence, and was banished. His second offence was capital, and he was to be hanged. By the common and statute laws of England, usury was an indictable offence, and fine, forfeiture, outlawry, and escheats were inflicted upon the offenders. Ord on Usury, 6. But none of these laws have been adopted into our system. Our courts consider the limit of interest a question of public policy only, not a question of ethics. They have decided that money paid for usury was paid under a natural obligation, and cannot be recovered back either by suit or by exception. *Perillat v. Peuch*, 2 La. 431. *Merchants' Bank v. Gove*, 15 La. 378.

The suit of the *Bank of the United States v. Owens*, originated in a State by whose laws usury avoided the whole contract. The decision was pronounced by a judge educated under the common law, and accustomed to regard usury as a legal, if not a moral offence. The demurrer by which the question was presented, admitted the violation of the law, and an unlawful and usurious intention. The usury was set up by a defendant, and not by a plaintiff—as a shield, and not as a sword. Such a decision can scarce be a guide under our Code and decisions, under a system derived from the Spanish law, and in a case where the position of the parties is reversed.

The plaintiff cannot be relieved from his contract, under the pretence that the Bank has violated its charter. A charter is something more than a law—it is a contract. The State and the stockholders are the parties to it. They have rights under it, which cannot be infringed or annulled, directly or indirectly, by strangers. Were it otherwise, the object of the grant of the franchise would be defeated. The rights of the State would be at the mercy of private speculation and cupidity. The plaintiff is not the guardian of the rights of the State. He has no mandate to punish a violation of the charter, which may be pardoned or may be prosecuted only by the State.

In the case of the *Chester Glass Company v. Dewey*, 16 Mass. Rep. 412, Chief Justice Parker decided that a man purchasing goods of a corporation, cannot, when sued for the price, allege that the charter did not authorize the corporation to trade. "The defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused."

In the case of the *Bank of the United States v. Fleckner*, 8 Wheaton, 355, the court say: "The taking of interest beyond the sum allowed, would doubtless be a violation of the charter, for which a remedy might be applied by the government; but as the act of Congress does not declare that it shall avoid the contract, it is not perceived how the defendant could avail himself of it to defeat a recovery." See Angell & Ames 510. 2 Kent's Com. 212.

In an action by a corporation, the defendant cannot show that it has forfeited its corporate rights. The forfeiture can be taken advantage of in no other way than by a suit in behalf of the people. Until it has been judicially declared in this form, individuals cannot avail themselves of it. *Trustees of Vernon v. Hill*, 6 Cowen, 23.

"The defendant contracted with plaintiffs in their corporate name; he thereby admits them to be duly constituted a body politic," &c. "It would be a violation of all common sense and justice, to permit him now to set up that no corporation ever existed." *All Saints' Church v. Lovitt*, 1 Hall R. 198.

And so in the case of the *Atchafalaya Bank v. Dawson*, 13 La.

this court expressly denied to the defendant the right to avail himself of the forfeiture of the charter, until such forfeiture had been demanded by the State which alone was competent to require it. There is no difference in principle between that case and the one now before the court. In that case, the plea was that the corporation had ceased to exist, and was incompetent to sue or contract, by reason of the violation of its charter. Here the plaintiff says that the contract is void, because the Bank has violated its charter.

The injunction was properly dissolved, and the exception properly sustained.

BULLARD, J. Two appeals are before us in this case; the first from a judgment dissolving an injunction granted at the inception of the suit, and the second from a judgment of nonsuit, rendered upon sustaining a peremptory exception. Our attention, for the present, will be confined to the last; for, if the exception is to be sustained, the injunction falls as a necessary consequence.

The action was brought, to cause to be annulled and rescinded, a contract of loan, secured by mortgage, on the allegations; That the contract was contrary to, and in violation of the charter of the City Bank, it having been entered into with a view to obtain a higher rate of interest than the charter permitted, and was, consequently, usurious. That, although it is stated in the written contract, that the loan was made in good current money, yet that, in truth, no money was given, but one hundred and thirty-eight bonds of the Second Municipality of New Orleans, of one thousand dollars each, were given to the plaintiff, which, together with a debt previously due by him, formed the only consideration of the mortgage; and that said bonds were given to disguise the profits made by the Bank. That the bonds were taken at par, although greatly depreciated, and that the Bank had paid the Municipality only at the rate of \$800 for a \$1000. The plaintiff, on these allegations, avers the nullity of the contract and the mortgage. He, therefore, prays for a judgment declaring null and void the contract and written obligations, and for general relief; and for an injunction to restrain the City Bank from proceeding, *pendente lite*, to enforce their mortgage.

The defendants filed a peremptory exception in the nature of a

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demurrer, to wit, that the petition contains no cause of action against the Bank; and that the plaintiff has no right in law to demand that the several bonds and mortgages referred to in his petition should be rescinded, or declared null and void, without returning or offering to return to the defendants, the one hundred and thirty-eight bonds of the Second Municipality, with all the interest collected on the same, and the several pre-existing evidences of debt and acts of mortgage, which, by the confession of the petition, the said Walden received from the defendants, in consideration of the bonds and mortgages now alleged by him to be void.

This exception presents the question, whether, admitting as true all the allegations in the petition, the plaintiff has shown a sufficient cause of action, and has entitled himself to a rescission of his contract with the Bank.

The charge is, substantially, that having effected a loan of the Bank, the plaintiff was induced to take a large part of the sum, to wit, \$138,000, in bonds of the Second Municipality, at par, bearing interest at six per cent, in lieu of money; and that the Bank had taken the same bonds at a discount of twenty per cent, thereby making a profit of more than eight per cent, the rate of interest and discount allowed by their charter, contrary to the charter itself.

It is not pretended that the transaction is tainted with fraud, nor that there was any material error or want of consent. The only ground of nullity alleged is, that the plaintiff took, at par, certain stocks then depreciated in value, and that the contract was usurious.

If this were an action against an individual, instead of a bank, we do not see upon what ground the plaintiff could hope for relief; for, even admitting that the contract was usurious, it would not follow that it could be annulled *in toto*. In this respect our law is supposed to differ from that of the states governed by the common law. Here the contract is voidable, only so far as it concerns the interest, and is valid for the principal. The argument, therefore, that the contract is null, because prohibited by law, is not sound; because the prohibition goes to the usury only, and not to the sale of the stocks, with a warranty by endorsement. It is not alleged in the pleadings, that the Bank is forbidden by its

charter to buy or sell stocks ; but the plaintiff demands that the contract should be wholly annulled. The circumstance, therefore, that one of the contracting parties is a bank, does not materially alter the case. Even supposing that the exaction, in any case, of usurious interest, contrary to the prohibition of the charter, would amount to a sufficient ground for a forfeiture of the charter, and that an individual has the legal capacity to demand such forfeiture, yet it has not been done in this case. The contracts of banks, so far as they are valid and lawful, like those of individuals, may be enforced by an action at law ; and no law of this state declares the forfeiture of the principal loaned, where a higher-rate of interest has been stipulated for, than the law permits.

We have heretofore considered the case in the light most favorable to the plaintiff, to wit, that the contract was tainted with usury. Whether it was so or not, it is not now our duty to pronounce ; because we are called upon to decide upon the exception alone, which denies that the petition discloses any sufficient legal cause for the rescission or nullity of the contract, which the plaintiff seeks to avoid. But it may be remarked, that the bonds of the Second Municipality, which the plaintiff alleges were received by him as cash, are payable many years hence, and bear interest at six per cent, and were endorsed by the Bank. If, at the time of payment, the full amount should not be paid, the Bank is obviously liable, as transferrer, to make up the defalcation ; and if, before their maturity, the plaintiff has chosen to dispose of them, he has not yet any recourse upon the Bank.

It is not alleged that there was any fraud in the transaction, nor does the plaintiff set forth any facts from which such fraud could be inferred as would vitiate the contract, independently of the alleged usury.

But it is further set forth in the exception, that the plaintiff has not made an indispensable averment in the petition, to wit, his readiness and ability to restore the bonds, and the interest received. It is quite manifest that there can be no rescission of a contract, without placing the parties in the situation they were in before the contract was entered into. It would be absurd to rescind a sale, for example, without restoring the price. This principle has been often recognized by this court, in relation to one class of ac-

tions of rescission, perhaps the most frequent in our courts, to wit, those of redhibition. The word itself implies, the replacing of the parties in the position they were in before the contract. It is now settled in this court, that such an action cannot be maintained without an offer to make restitution. 2 Mart. N. S. 466. 4 La. 198. 19 La. 283.

The authorities principally relied on by the counsel for the plaintiff, are drawn from the common law, and are cases under usury laws which make the whole contract void.

The court, in our opinion, did not err in sustaining the exception, and dismissing the suit.

The same reasoning applies to the motion to dissolve the injunction, which was based upon the same grounds.

But the court below erred, in our opinion, in giving judgment against the principal and sureties, on the injunction bond, for damages, according to the act of 1831. The defendants should have been left to their remedy on the bond, inasmuch as the execution of a judgment was not enjoined. *Morgan v. Driggs et al.*, 17 La. 176. 19 La. 396.

It is, therefore, ordered and decreed, that the judgment of the District Court, sustaining the exception and dismissing the suit, be affirmed with costs; but that the judgment dissolving the injunction with costs, be affirmed as to the dissolution, and reversed as to the damages recovered against the plaintiff and his sureties, reserving to the defendants their recourse upon the injunction bond; and that the costs of the two appeals be paid by the appellees respectively.

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THE CITY BANK OF NEW ORLEANS v. DANIEL TREADWELL
WALDEN.

Defendant commenced an action to rescind a contract of loan for \$200,000, the amount of which was secured by mortgage, and obtained an injunction to restrain the plaintiffs from summary proceedings under the mortgage until the further order of court. The injunction having been dissolved, himself and his sureties in the injunction bond took a suspensive appeal, giving security in the sum of \$6000. Plaintiffs thereupon applied for an order of seizure and sale, which was refused, on the ground of the pendency of the appeal from the order dissolving the injunction. On appeal by the plaintiffs from this judgment: *Held*, that a suspensive appeal having been taken from the judgment dissolving the execution, the injunction was thereby maintained until the final decision of the appellate court.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. This case is a direct consequence of that of *Walden v. The City Bank of New Orleans*, just decided. After the injunction in that case, inhibiting the Bank from prosecuting an order of seizure and sale, had been dissolved, and a suspensive appeal had been allowed, the Bank presented a petition praying for an order of seizure and sale under their mortgage. To a rule to show cause why it should not be issued, the defendant answered, that he was ignorant of any such suit as that stated in the rule; that he had never been cited; and he denied the right of any corporate body or person to hold him to answer any such rule, the same being a nullity. He further answered, that the making of the rule absolute, would be a violation of the injunction yet in force in the case of *Walden v. The City Bank*, (*ante* p. 165.) He also pleaded the pendency of the suit, putting in issue the contract on which the plaintiffs seek to obtain the order of seizure.

The rule was discharged, and the order of seizure and sale refused, and the Bank has appealed.

We are of opinion that the judge did not err. An appeal having been taken from the judgment dissolving the defendant's injunction within ten days, and bond with security having been given, as required by law, for a suspensive appeal, the judgment could have no effect pending the appeal. The injunction was, therefore, maintained in force by the effect of the appeal, until the question should be finally disposed of by the appellate court.

Banchor, for the use of &c. v. Bell.

The judgment of the District Court is therefore affirmed with costs, without prejudice to the plaintiffs' right to their order of seizure and sale since the final decision of this court in the case of *Walden v. The City Bank of New Orleans*.

Lockett, Micou, and L. Peirce, for the appellants.

Grymes and Hoffman, contra.

JOHN BANCHOR, for the use of James Cheever, v. JAMES GEORGE BELL.

Under art. 2796 of the Civil Code, which in this respect has altered the general commercial law, the joint owners of a ship or other vessel, are, in all transactions relative to the use of such vessel or for the objects of the association, as to third persons, commercial partners, and responsible as such *in solido*.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. The defendant, and Dunn were owners of a steamer called the *Daniel Webster*, engaged in transporting passengers and personal property for hire, or on freight. The defendant was the resident partner in New Orleans, where he attended to the business of the concern; and Dunn acted as clerk on board. The plaintiff was a passenger on the boat at different times, and money being wanted for the use of the boat, as the clerk alleged, while on her voyage, he mentioned it to the captain, telling him that the plaintiff had money, who in reply told the clerk to obtain it if he could. It is certain that on two occasions money to a large amount was advanced by the plaintiff, and the captain and engineer say that it was used in paying charges on cotton taken on freight, it being customary in the trade in which the boat was engaged to advance those charges. On the 20th of March, 1840, a short time after these loans were made, Dunn made a due bill or promissory note in favor of Banchor for \$1150, which he signed as clerk of the steamer, and on which this action is founded.

The defendant admits the ownership of the steamer, and the capacity of Dunn to act as clerk; but says that he had no right to borrow money for the use of the boat, and that if any money

was ever borrowed, it was not applied to the use of the boat nor of its owners, but to that of Dunn individually.

Captain Kelly states that sufficient funds were not supplied by the defendant for the use of the steamer; that he was frequently obliged to borrow from passengers; and that considerable sums were often necessary to make advances for charges on produce shipped on board, without which it could not have been obtained. On the part of the defendant it is shown, that it is not the custom for clerks of steamboats on the lower Mississippi to borrow money for the use of vessels on board of which they are employed, and that it is generally done by the captain when necessary; that no entry was ever made on the books of the boat of any money having been borrowed from the plaintiff; and that it appears from those books, kept by Dunn, that large balances in favor of the steamer were on hand at the time when it appears that the loans were made. Some time after the execution of this note or due bill, Dunn absconded, without rendering any account of the affairs of the steamer.

On the part of the plaintiff it is further shown, by the testimony of C. N. Harris, that money was loaned to Dunn in Vicksburg, at other times than those mentioned by Captain Kelly, and that a final settlement took place between Banchor and Dunn. It was said at the time the money was advanced, that it was for the use of the steamer; and when the settlement took place, Dunn promised to pay the amount of the note out of the funds of the boat, as soon as she returned from New Orleans.

The Commercial Court gave a judgment for the defendant, from which the plaintiff has appealed.

I. W. Smith, for the appellant. This is an action for money lent to the owners for the use of the boat. Dunn was a commercial partner of the defendant. Civ. Code, art. 2796. The court, in *Vigers et al. v. Sainet*, 13 La. 303, say: "Partnerships for the purchase and sale of personal property, and for carrying personal property for hire in ships or other vessels, are commercial partnerships by our laws." In *Burke v. Clarke*, 11 La. 209, that "a partnership for this purpose is a commercial one." In *David v. Eloi*, 4 La. 110, that "whether the parties first enter into partnership to carry goods for hire. and then buy a vessel to enable them

to do so, or commence by buying a vessel, and then carry goods for hire, their obligations appear to be the same. They are bound jointly and severally."

The contracts of Dunn on account of the boat, had they been in his individual name, are binding on the defendant. In the case of *Vigers v. Sainet*, the suit was on a note made by the commissioners of the steamer Cuba for money borrowed by them. There was no inquiry as to what was done with the money for which the note was given. The court said: "We are bound to consider the partnership as a commercial one, and the stockholders are bound *in solido* for the debts of the Company;" and the defendant was held liable, though not a signer of the note.

In the case of *Burke v. Clarke*, the court say, that "the part owners of a steamboat employed in carrying goods and passengers, are jointly and severally bound *for the acts of each other*." The action in that case was against both the owners of a steamboat, for a slave lost by one of the owners, who was the master, and each part owner was held responsible.

In *Philips v. Paxton*, 3 Mart. N. S. 42, the action was brought to recover a note signed by Paxton, in his individual name, for goods sold on account of Paxton & Gorton. The court said: "Taking it then as a fact, that the vendor of the goods for which this note was given, sold them *with a knowledge of the appellant's being a partner, and with an eye to his responsibility*, does the selling them to one of the partners by name prevent recourse against the other? The name given to the association is of little importance; they may call it what they please; they may give it the denomination of such a one & Co.; of two or more of the partners; of one, or of all; or they may leave it without any. If they resort to the latter mode, as was done in the instance before us, their contracts are not, on that account, less binding. *It is too late for him, after hanging out these colors to mankind, to endeavor to escape from the responsibility which, in law, in equity, and in justice, he has incurred. Qui sentit commodum, sentire debet et onus.*"

In *Winship et al. v. Bank of the United States*, 5 Peters, 566, Chief Justice Marshall, delivering the opinion of the court, decided, that "where money has been procured by a partner in whose

name the partnership business is conducted, by discounting a note endorsed by him on the credit of the co-partnership, a subsequent misapplication of the funds does not exonerate the other partners." See also Bayley on Bills, 52.

In 3 Chitty's Commercial Law, 239, the principle is stated that each partner is liable for the fraud of his partner, if the partner act professedly on the joint account, though in truth for his private emolument, and a third party had no notice of said fraud, for one partner cannot excuse himself by saying that the other has entered into engagements of which he was totally ignorant, or has conducted himself fraudulently and dishonestly. See Watson, 175. Cowper, 814. *Bond v. Gibson*, 1 Campbell, 185. 2 Campbell, 561. 2 Esp. 524, 731. 1 East, 48. 7 East, 210. *Ridley v. Taylor*, 13 East, 175. 2 Starkie, 287, 347. 4 Maule & S. 475. 8 Ves. 542. 15 Ves. 286.

Such is also the law of France. Pothier, Contr. de Société, No. 101, says: "*Lorsque la dette a été contractée au nom de la société, elle oblige tous les associés quand même la dette n'aurait aucunement tourné au profit de la société: par exemple, si l'un des associés a emprunté une somme au nom de la société, quoi qu'il ait employé cette somme à ses affaires particulières et non à celles de la société. Le créancier qui a son billet signé 'et compagnie,' peut en demander le paiement à tous les associés; car ce créancier ne pouvait pas prévoir l'emploi que l'associé ferait de la somme qu'il lui a prêtée pour la société. Les associés doivent s'imputer de s'être associés à un associé infidèle, de même qu'en pareil cas un commettant doit s'imputer d'avoir préposé à ses affaires une personne infidèle.*"

Pardessus, in his treatise on Commercial Law, vol. 4 No. 1024, declares: "*Lorsque les associés n'ont attribué à aucun d'eux en particulier le droit de signer les engagements de la société, ce que fait chaque associé les oblige tous, parce que tous se sont constitués mandataires les uns des autres, et qu'ils sont censés avoir annoncé au public que ce qui serait fait avec l'un d'eux serait censé l'être avec tous. Ainsi dès qu'un associé sans opposition des autres, dûment notifiée à celui avec qui il traitait, comme on a vu N. 1021, qu'il en avaient le droit a emprunté une somme, peu importe au prêteur que cet associé l'ait versée dans la caisse de la*

Banchor, for the use of, &c. v. Bell.

société, ou qu'il l'ait appliquée à ses affaires particulières, la société est toujours obligée. Nous avons vu N. 1020 qu'il en est de même du paiement qu'un débiteur de la société ferait à cette associé. C'est aux autres à s'imputer de s'être donné un associé infidèle de meme qu'un commettant de se reprocher l'abus de la confiance qu'il a donnée à son commis."

C. M. Jones, contra. Dunn had no authority to borrow money for the use of the boat. Though a part owner, plaintiff must show that the money was necessary for the boat, and applied to its use, and neither was the case here. The decision below was correct. See Abbott on Shipping, 100-110, as to the power of the master to bind the owners for repairs and necessities; and 4 Barn. & Ald. 352, as to the officer authorized to borrow, or order repairs. Also *Ross v. Ship Active*, 2 Wash. Cir. Rep. 226.

GARLAND, J. The judge *a quo* considered this as a case coming exclusively under the commercial law, and that the fact of Dunn being a part owner of the boat, is not entitled to any weight in the decision of the case, although article 2796 of the Code provides, that all partnerships for carrying personal property for hire in ships or other vessels are essentially commercial. So far from the circumstance of Dunn's being a part owner of the steamer, not being entitled to any consideration, we are of opinion that it is a most important part of the case, and that in not giving it due weight, the inferior court has erred. The above mentioned article of the Code, and others make a material change in the relations and responsibilities of joint owners of ships and other vessels, from what they are under the commercial law, and we cannot disregard them. As regards third persons, in all transactions relating to the use of the ship or vessel, and to the responsibilities incurred in consequence of such use, or to facilitate the objects of the association, the joint owners are unquestionably commercial partners, and responsible as such. It, therefore, appears certain, that for money raised for the purpose of carrying on the partnership and making it profitable to the partners, each is liable *in solido*, and this court, in a number of cases, have so held them responsible. 4 La. 110. 11 La. 209. 13 La. 303. The judgment of the inferior court is in our opinion erroneous, and must be reversed.

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In coming to this conclusion, we are not to be understood as expressing any opinion upon the question of how far the acts of one joint owner in selling or disposing of the ship or vessel to a third person, affect the right of property of another proprietor or co-owner.

The judgment of the Commercial Court is reversed, and this court, proceeding to give such judgment as in its opinion ought to have been given in the court below, decrees, that the plaintiff, Banchor, for the use aforesaid, do recover against the defendant, James G. Bell, the sum of eleven hundred and fifty dollars, with interest at the rate of five per cent per annum, from the 11th day of July, 1840, until payment, with costs in both courts.

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Though the creditors of an estate, the property of which has been sold by order of court to pay their claims, are not, technically, warrantors of the purchaser, yet as their obligation to repay the price distributed among them depends on the eviction of the latter, their situation is analogous to that of a vendor, and they should be made parties to the action against the purchaser. The latter cannot be compelled to bring as many actions, in their different parishes, as there may be creditors liable to refund.

In an action against the purchaser of property sold under a *feri facias*, the parties to the original suit may be cited in warranty. Having received the purchase money, if the consideration of the sale fail by the eviction of the purchaser, they will be bound to refund; and their liability must be regulated by arts. 2599 of the Civil Code, and 711 of the Code of Practice.

The creditors of an insolvent who has made a surrender, are not the owners of the property surrendered for their benefit. Their interest is the same as that of a plaintiff in property seized under a *fi. fa.* They cannot sell it without an order of the court before which the proceedings are pending; and the sale must be made like that of property seized under execution.

By the acceptance of the *cessio bonorum* by the judge for the benefit of the creditors, the property surrendered is vested in the latter so as to be no longer liable to seizure, attachment, or execution; but they acquire no real ownership in it. It is vested in them only to a certain extent, and for certain purposes. They cannot hold it in common, nor partition it in kind. It is in their hands only as a pledge, which they are bound to have sold in the manner pointed out by law, in order to divide the proceeds among themselves. The real ownership remains in the debtor, who may take it back on depositing in court a sum sufficient to pay his debts, and who, in case of sale, is

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entitled to any balance in the hands of the syndic after the payment of his debts, as an ordinary debtor to any surplus in the hands of the sheriff after the satisfaction of the judgment under which his property has been sold.

By art. 2602 of the Civil Code, all the warranties to which private sales are subject, exist against the heirs in judicial sales of the property of successions. *Aliter* as to the creditors, on the sale of the property surrendered by an insolvent. The heirs are warrantors to the fullest extent, being owners and vendors, while the creditors are neither. The latter are only responsible, severally, for the restitution of the proceeds of the sale of the property received by them.

The omission by a purchaser, to notify his vendor, or those who are responsible to him in case of eviction, of the action instituted against him, will not, under arts. 2494 of the Civil Code, and 388 of the Code of Practice, release the latter, unless they can show that they had means to defeat the action, which were not used owing to their not having been cited in warranty, or apprized of the institution of the suit. By the word *means* in art. 2494 of the Civil Code, must be understood new facts, or peremptory exceptions, which, if presented to the court, would have produced a different result. It will not be sufficient to show that there was error in the judgment, for the same judgment would have been pronounced against them, had they been cited.

Where the defendant in a petitory action has established the value of the improvements made by him on the premises, and plaintiff seeks, under art. 500 of the Civil Code, which gives to the owner of the soil on which plantations or constructions have been made by a third person, the election either to reimburse the value of the materials and the price of workmanship, or to pay a sum equal to the enhanced value of the soil, to avail himself of the privilege by paying the enhanced value, he must show the amount of such enhanced value.

THIS was an action before the District Court of East Baton Rouge, by Francis and Zenon Rivas, to recover two-thirds of a tract of land about nine miles below the town of Baton Rouge, of from twelve to thirteen *arpens* front on the Mississippi river, which they allege originally belonged to their grandfather, and on the partition of his estate fell to the share of their father, by whose death it descended to them, in common with their sister, Virginia Rivas. They prayed that they might be declared to be the lawful owners of two-thirds of the tract, that they might have possession thereof, for damages, and for the rents and profits during the adverse possession of the defendant. The action was commenced against Hunstock, who alleged, that he was in possession as the tenant of Bernard. The latter was made a party, and answered that he was the owner of the tract of land mentioned in the petition, having purchased it at a public sale made by the syndic of the creditors of the late Marie Rivas, the mother of the plaintiffs, for the

sum of \$9100. That the sale was made under an order of a competent tribunal, conformably to law, and that the price was paid by him to the syndic. That, at the death of the plaintiffs' father, his succession was encumbered with a large amount of community debts. That the tract of land in question belonged to the community, and was legally adjudicated to his widow, the mother of the plaintiffs. That long after this adjudication, finding herself unable to pay the community debts created by her husband, she surrendered to the creditors of the community and to her own creditors, all her property, including this land. That the land, with the other property ceded, was regularly sold, for the payment of the community debts for which it was liable. That after the sale, and before the tableau of distribution was filed, the mother of the plaintiffs died. That the plaintiffs became, subsequently, parties to the tableau presented by the syndic, and opposed it, and received their respective shares of the proceeds of the sale. That, as heirs, they took possession and disposed of the effects left at the death of their mother, and thereby became bound, as warrantors of Bernard's title. Bernard further averred that he had erected improvements on the land to the value of \$5000; and prayed, in case judgment should be rendered in favor of the plaintiffs, that they might be compelled to refund the price paid by him and the value of his improvements; and that the sister and co-heir, Virginia Rivas, and the creditors of Marie Rivas, the mother, who were placed on the tableau of distribution, may be cited in warranty, and condemned in such judgment as may be rendered against him. The judge *a quo* refused to allow the heirs and creditors to be cited in warranty, to which the defendant, Bernard, excepted. A judgment rendered in favor of the defendant by *Morgan, J.*, was reversed in the Supreme Court, (13 La. 159.) The two-thirds of the tract claimed in the petition were decreed to belong to the plaintiffs; and the court below ordered to make a partition thereof according to law, to ascertain the value of the improvements made by the defendant, and the amount of his claim against the parties cited in warranty. From the judgment of the District Court, rendered in pursuance of this order, by *Johnson, J.*, the defendant, Bernard, and the parties cited in warranty, have appealed.

MORPHY, J. This was a petitory action decided by this court in favor of the plaintiffs, in March, 1839. The report of the case contains a full statement of all the pleadings and facts relative to the question of title. 13 La. 172. That judgment decrees to the petitioners two undivided thirds of the tract of land described in their petition, and in the defendant Bernard's possession, and remands the case to the District Court "to make a partition thereof according to law, and to ascertain and establish the value of the improvements made by Bernard on the premises, and *his claim against the parties called in warranty.*" It provides, further, that no writ of possession shall be issued in the case, until the plaintiffs shall have paid to Bernard the value of his improvements, &c. When the case was first before the inferior court, the defendant, Bernard, believing that an order was necessary to call in warranty the creditors of Marie Rivas, at the sale of whose estate he had purchased the land, moved for citations to be issued to them, and for time to be allowed to them to appear and answer, which the court refused, being of opinion that the creditors could not be cited in warranty, they being only liable (if at all,) for the restitution of the price of the property. To this decision Bernard took a bill of exceptions, which appears to have been overlooked by this court, or at least not adverted to in its opinion. On the return of the case to the District Court, the judge, under the decree of this tribunal, thought it his duty to order citations to be issued to the creditors. The latter appeared, and excepted to the call in warranty, and their objections being overruled, they took a bill of exceptions. In their answer to the merits, the creditors pleaded the general issue; averred that, if liable at all, they were bound only for the restitution of so much of the price of the land sold to Bernard as they severally received; but that, in consequence of his neglect to have them cited in warranty, anterior to the rendition of the final judgment in the case, they are released from all liability to him, because, had they been cited, they could have made a successful defence. But should they be considered in any way liable, they deny the allegations of the plaintiffs, and contend that the property claimed in this suit really belonged to the community existing between the father and mother of the plaintiffs, was lawfully adjudicated to Marie Rivas at the price of

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the inventory, was surrendered by her to her creditors, sold by the order of a competent court for the purpose of paying the debts of the community as well as her own, and that this sale cannot be attacked except by a direct action of nullity; that the plaintiffs' father left an estate encumbered with debts, which were paid with the proceeds of the land claimed, and that the plaintiffs cannot recover until they first pay the amount of such debts, to wit, \$8439 79, and a further sum of \$3144 42 received by them, being two-thirds of the funds remaining in the hands of the syndic of their mother's estate arising from the sale of all the surrendered property, including the price of the land in dispute, after paying all her debts and those of Francis Rivas her husband. They aver that the plaintiffs have taken possession and disposed of the estate of their mother, (acquired after her surrender,) and have thereby made themselves her unconditional heirs, and cannot institute this action, being bound to fulfil her obligations of warranty towards the defendant Bernard. Should they be held liable as warrantors, the creditors pray that it may be decreed that Bernard is vested with a good and legal title; and that if the plaintiffs be entitled to the land, they shall not have possession until they pay the aforesaid sums of money. By an amended answer, the defendant Bernard prayed that the plaintiffs might be cited in reconvention, and decreed to pay him \$10,000 for the two-thirds of the improvements made by him on the land; and the further sum of \$3144 42 received by them from the syndic of the creditors of their mother, Marie Rivas, out of the price paid by him for the land he had purchased.

There was a judgment below decreeing to the defendant Bernard the sum of \$2133 33 $\frac{1}{2}$ for the value of his improvements on the land after deducting the rents allowed to the plaintiffs, and the further sum of \$3144 42, to be paid to him by the plaintiffs as part of the \$6666 66—the two-thirds of the price paid for the land—the balance of which, to wit, \$3522 34, the creditors called in warranty, were decreed to pay *pro rata*. The judgment further decrees a partition of the land to be made, &c.

Elam, for the plaintiffs, urged that the judgment was erroneous so far as it condemned them to pay Bernard any thing on account

of the improvements, and in allowing him \$3144 32, as part of the price of the land.

R. N. Ogden and Mazureau, contra. The property in dispute belonged to the community of *acquêts* between Rivas, the father, and his wife, the mother of the plaintiffs, and was legally adjudicated to her. By her cession and the sale, it became the property of Bernard. Code of 1808, p. 344, art. 1. Civ. Code, arts. 338, 2374, 2414. *Harty et al. v. Harty et al.*, 8 Mart. N. S. 518. 18 La. 361. Bernard having acquired the land at a sale under the orders of a competent tribunal, and having paid the price, has acquired a title which can only be contested in an action of nullity. *Dussuau's Syndics v. Bredeaux*, 4 Mart. 450. *Mayfield v. Comeau*, 7 Mart. N. S. 180. *Childress v. Allen*, 3 La. 477. By appearing and contesting the sale of distribution, with the view of causing themselves to be placed on it for a larger amount than the syndic had stated to be due, the plaintiffs have acknowledged the validity of the proceedings in the surrender, and are bound thereby. See cases cited above from 4 Mart. 450. 7 Ib. N. S. 180. *Chesneau's Heirs v. Sadler*, 10 Mart. 726. *Hunt's Heirs v. Lefebvre et al.*, 6 La. 601. *Groun et al. v. Abat's Executors*, 7 Ib. 17. *Blount v. Syms*, 12 Ib. 173. Plaintiffs accepted the succession of their mother purely and simply. Civ. Code, arts. 876, 878, 982, 986, 988, 993, 1003, 1006, 1007. As her heirs they are estopped by her warranty. Civ. Code, arts. 876, 934-936, 1007. *Vienne v. Bossier*, 10 Mart. 359. *Colton v. Cullen*, 2 La. 371. *Guerin's Heirs v. Bagneries*, 18 La. 590. Should the plaintiffs be entitled to recover the land, there must be judgment against them for the amount of the debts of their father paid from the proceeds of the sale, and for the sums severally received by them from the syndic. As to the liability of the creditors cited in warranty, see Civil Code, art. 2599. Code of Pract. art. 711.

MORPHY, J. The first question to be examined is that presented by the bill of exceptions, taken by the creditors in relation to the call in warranty made on them by the defendant Bernard. It has been urged by the counsel of the latter that, by sending the cause back to be tried contradictorily with the creditors on his claim against them, the judgment of this court has virtually decid-

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ed that they were to be cited in warranty in this suit as prayed for; while, on the part of the creditors, it is said that the first bill of exceptions was entirely overlooked, because the attention of the court was not called to it in the points made by the defendant Bernard. Be this as it may, we are of opinion that, although the creditors of an estate, the property of which has been sold under the order of a court to pay their claims, are not, technically speaking, warrantors, yet as their obligation to repay the price distributed among them depends on the eviction of the purchaser, they stand in a situation analagous to that of a vendor, and should be made parties to the suit brought against the purchaser. The recourse of the latter would be difficult indeed, if, to obtain reimbursement, he was to be driven to the trouble and expense of bringing as many suits, in different parishes, as there may be creditors liable to refund the proceeds of the property. The creditors themselves complain with bad grace that they were afforded an opportunity of uniting their efforts with those of the vendee, to defeat an action by which they are to be so materially affected. In *Guerin v. Bagneries*, 13 La. 17, we held, that the parties to a suit in which a *fi. fa.* has issued, under which property has been sold, could be brought into court to defend the purchaser by a citation in warranty. The creditors, at whose suit surrendered property is sold, appear to us to occupy much the same position as the plaintiff in a *fi. fa.*; they are not properly vendors, yet as they receive the purchase money, if the consideration of the sale fail by the eviction of the purchaser, they are, like him, bound to refund it. This obligation renders them warrantors to a certain extent, and no good reason is perceived why they should not also be brought in by citation in warranty—a convenient proceeding, equally advantageous to all parties. As to their liability to the defendant, we are clearly of opinion that it must be regulated by article 2599 of the Civil Code, and article 711 of the Code of Practice. Where property has been surrendered by a debtor, his creditors have no more the ownership of it than if it had been seized under a *fi. fa.* They cannot sell it without an order of the court in which the proceedings are pending, and this sale, according to article 2180 of the Code, must be made like that of property seized under execution. A subsequent enactment has given

to the creditors the privilege of fixing the terms on which the sale is to be made ; but the same formalities must be pursued as in the case of a *fi. fa.* Article 2602 of the Code, to which we have been referred, provides that all the warranties to which private sales are subject, exist against the heirs in judicial sales of the property of successions. It is urged that the same responsibility should attach against the creditors on the sale of an insolvent estate ; but the reason on which the liability of the former rests, does not apply to the latter. The heirs are warrantors in the legal acceptance of the term, and to the fullest extent, because they are owners and vendors, while the creditors, at whose suit a sale is made, are neither. But it is insisted, that, as under the statute of 1826, all the property of the insolvent is vested in his creditors, they become the owners of it, and should be placed on the same footing as the heirs. On an attentive examination of the whole statute it will be found that, although by the acceptance of the *cessio bonorum* made by the judge for the benefit of the creditors, the property is vested in the latter, so as to be no longer liable to seizure, attachment, or execution, the creditors acquire no real right of ownership or dominion over it. The property vests only to a certain extent, and for certain purposes ; they cannot hold it in common, nor partition it in kind ; it is in their hands only as a pledge which they are bound to have sold in the manner pointed out by law to divide the proceeds among themselves, but the real ownership yet remains in the debtor, who can take back all his property on depositing in court a sum sufficient to cover all his debts, and who, in case of a sale, is entitled to the balance remaining in the hands of the syndic after the payment of his debts, in the same way as a debtor is entitled to any surplus in the hands of the sheriff, after satisfying the judgment under which his property has been sold. 2 Moreau's Dig. 437, sects. 2 and 9. Civ. Code, arts. 2171, 2174, 2175, 2176-2178. We, therefore, conclude that the creditors are not liable to a full warranty as vendors, and can only be held responsible for the restitution of the proceeds of the sale of the property severally received by them. 6 La. 738. But the creditors contend that the defendant Bernard has lost even this limited recourse against them, by his neglect to have them cited in warranty before the rendition of the final judgment in this court.

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They aver that had they been cited in time, they could have made a successful defence; that had Bernard properly urged his bill of exceptions, no final judgment could have been rendered had this court considered them as warrantors, but that the whole case must have been sent back; that, at all events, he should have prayed for a re-hearing, and have called upon the court to express an opinion on his call in warranty, and to remand the case to be tried contradictorily with them. They further contend, that if they are now in any way bound to answer the defendant's call on them, the whole case should be considered as open; and that, should they show a good defence, it must avail the defendant Bernard, notwithstanding the judgment obtained by the plaintiffs, which is said to have been irregularly rendered.

In support of this last position, Bernard and the creditors have united their efforts, and pressed it with great zeal and earnestness. They succeeded, it appears, in convincing the judge of the first instance, that the whole case should be opened, even with regard to the question of title. After hearing all the parties as if the case was submitted to him for the first time, he has reviewed the matters passed upon by this court, and has been pleased to declare that the decision made on them appeared to him to be in conformity with law and the rights of the parties; from which we are to infer, that, had he thought differently, he would have believed himself authorized to give his judgment in opposition to that decision. How the counsel or the judge could have persuaded themselves that a final judgment of this court, which had become the property of the party obtaining it, could be thus disregarded and set at naught, is difficult to understand. The case was not remanded for a new trial on the main issue between the plaintiffs and the defendant Bernard, but, among other objects, to settle the claims of the latter against the parties responsible to him. The fact of these parties not having been cited in warranty, whether owing to the neglect of Bernard or not, might, indeed, release them from their liability, but could surely give them no right to disturb the final judgment rendered in the case before they were called in. They are bound by such judgment, and liable to Bernard, unless they can show that they had it in their power to defeat the plaintiffs' action by means of defences, which were not used, owing to

the failure to call them in, or to apprise them of the institution of the suit ; but in no case could the final judgment, as regards the question of title, be reviewed, or treated as a nullity on that account. Code Pract. art. 388. Civ. Code, art. 2494. We have, then, only to examine whether Bernard has lost his recourse against the creditors for reimbursement. If he has, it must be because the latter *had means of defeating the plaintiffs' action*, which were not used by him. By the term *means*, in the article above cited from the Code of Practice, we understand new facts put on record, or a peremptory exception, which, if presented to the court, must have produced a different result. The word *proofs*, which is the expression to be found in the corresponding article of the Civil Code, article 2494, agrees with the meaning we give to the article of the Code of Practice. We have, therefore, most attentively compared the evidence and pleadings in the two records in this suit, and have not discovered in the last suit any material fact or plea not to be found in the first. Whether, on the same evidence and pleadings, and after the able argument we have had the benefit of, the court, as at present composed, would have come to the same conclusion as this court did on the former trial, in relation to the plaintiffs' right to recover, it is unnecessary for us to say ; but had the warrantors even succeeded in convincing us that there was error in the judgment rendered in the case, it could not have availed them. Relying on the maxim, *res judicata pro veritate habetur*, Troplong remarks, in relation to the failure to call in the vendor : "*mais si l'acheteur n'avait pas appelé le vendeur, et si celui-ci ne prouvait pas qu'il avait des moyens suffisans de faire rejeter la demande, il ne servirait de rien de dire et même d'établir que les juges se sont trompés.*" "*La magistrature est un pouvoir public auquel on est forcé de recourir pour avoir justice. L'acheteur s'est défendu devant elle ; il a résisté comme il le devait ; s'il est condamné, même par erreur, il doit avoir son recours contre son vendeur à qui le jugement est opposable. Le vendeur aurait été de même, s'il eut été en cause.*" Vente, v. 1, No. 424. The creditors have not, in our opinion, shown that they had any means of defeating the plaintiffs' action, which have not been relied on by the defendant Bernard. They are, therefore, liable to reimburse to him the price he has paid, so far as they have received it.

It has, finally, been contended by the creditors, that the plaintiffs must be decreed to pay the amount of the debts of their father, paid out of the proceeds of the sale of the land which they now claim as his heirs, and to refund the sums they have received from the syndic of their mother's estate. The improper and illegal adjudication made to Marie Rivas of all the property left by her husband, and supposed to belong to the community of *acquets*, without previously paying the community debts, has created much difficulty and confusion as to the rights and liabilities of the plaintiffs and their true position in relation to the estate of their mother ; it has, moreover, been extremely prejudicial to them. From the situation of the estate of Francis Rivas, at the time of his death, it is very probable, had a regular settlement of it been then made, that the community property would have nearly sufficed to pay off all the community debts ; and his heirs might have kept the land in question, or, if compelled to sell it to pay the debts of their father, they would have had a large surplus of its proceeds. But an adjudication of the whole succession, unliquidated, having been made to their mother, she contracted debts of her own, without discharging those she had assumed, and some time after made a surrender of the whole property to her creditors. No liquidation of the community having been made, the claim of Rivas' children against their mother in consequence of the adjudication, was uncertain, and necessarily subordinate to the payment of the debts of their father. These debts were afterwards mingled with those contracted by his wife on her own account, and were paid off indiscriminately by the syndic out of the proceeds of all the property sold, together with the heavy charges incidental to the settlement of a surrendered estate, thus leaving as a balance due to the three children of F. Rivas only a sum of \$4716 63. Of this balance the plaintiffs have received their portion, amounting to \$3144 42, in the purchase of property at the sale made by the syndic. The land, the two undivided thirds of which have been decreed to belong to the plaintiffs, sold for \$9100, which sum, with the proceeds of the other property surrendered, was applied to the payment of the debts of their father as well as of their mother. This circumstance renders it impossible for us to regulate and determine the liability of the plaintiffs for the debts of

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their father towards the creditors of the community, who have been decreed to refund to the defendant Bernard a part of what they have received. We cannot say what portion of the price of the land was applied to the payment of the community debts. It will be for these creditors to establish, hereafter, against the plaintiffs, their claims in this respect, if any they have. The record does not enable us to pronounce upon them; but it is worthy of remark that the property sold by the syndic, independently of the land sued for, brought the sum of \$9317, which was more than sufficient to pay the debts of the plaintiffs' father, had they not been mingled with those of their mother and the charges for the settlement of her estate. As to the sum of \$3144 42, which they received as creditors of the estate of their mother, out of the balance in the hands of the syndic, it is clear that the plaintiffs are bound to refund it. Having claimed as their own, by inheritance from their father, two-thirds of the land which had been sold as community property, and which brought \$9100, they cannot, at the same time, take the land, and continue to keep this sum which may be considered as a part of its proceeds. Had the syndic not received the price of this land as a part of the assets of the community, there would have been no balance due to the plaintiffs as creditors of their mother, in consequence of the adjudication made to her. But the counsel for the plaintiffs have contended that, if liable to refund, they are to pay back this money to the creditors, and not to the defendant Bernard, between whom and them there is no privity of contract. Admitting this to be true, the money returned to the creditors, would have to be paid by them to the defendant Bernard, who claims at their hands the reimbursement of the price paid for the property. All these parties being before the court, the judge, to avoid a circuitry of actions, properly decreed the plaintiffs to refund this amount directly to Bernard, whose recourse against the creditors is thereby reduced, as follows:

The price paid by Bernard, was	- - - - -	\$9100
Two-thirds of which are to be reimbursed to him, say,		6666 66
From which deducting	- - - - -	3144 42
		<hr/>
There remains only a sum of	- - - - -	\$3522 24

which the judgment appealed from has apportioned among the creditors called in warranty, according to the amounts respectively received by each of them.

Having thus disposed of the several questions connected with the call in warranty for the reimbursement of the price, we shall proceed to consider the other matters, for the adjustment of which the case was remanded. On the trial the plaintiffs offered evidence to prove the value of the rents and profits of the land, since the service of the citation on the defendant Bernard. This was objected to, on the ground that the decree of this court, being silent as to the fruits or rents claimed by the plaintiffs, had disallowed them. It is clear that the naked question of title was alone decided, and that all other matters were left open to be settled on the remanding of the case. The omission of this court to mention the rents or fruits, among the respective claims of the parties growing out of the eviction, should not deprive the plaintiffs of them, as they were claimed in the petition, and have clearly not been passed upon. Civ. Code, 3416. 8 Mart. N. S. 620. 2 La. 173.

In relation to the improvements, the evidence shows that Bernard expended \$1000 on the sugar mill in putting up a cane carrier, and thoroughly repairing it, and that he built a few cabins, and cleared, ditched, and fenced between seventy and eighty acres of the land. It is contended by the plaintiffs' counsel that the repairs to the sugar mill did not enhance its value, and must be considered to have been necessary to preserve it in a state of usefulness; and that the wood on the land cleared, was worth as much as the labor of clearing it. The repairs to the sugar mill were a useful improvement, and certainly enhanced its value if they prevented it from becoming altogether useless. As to the clearing of the land, several witnesses, it is true, say that on well timbered land situated on the river Mississippi, the wood, if good, is worth the clearing; but they do not speak in relation to this land, nor does the evidence show it to have been well timbered, nor the wood growing on it to have been of good quality. The witnesses tell us, moreover, that Bernard keeps no wood yard, and that he is not in the habit of selling wood; and they all agree that the clearing of lands greatly enhances their value. To the plaintiffs,

then, the clearing is an improvement for which they must pay ; but they insist that, if liable, they are to pay only a sum equal to the enhanced value of the soil, and that there is no evidence showing the amount of such enhanced value. Article 500 of the Civ. Code, gives to the owner who procures the eviction, the election whether he will pay the value of the materials and the price of workmanship, or a sum equal to the enhanced value of the soil ; but, we apprehend, that if the owner wishes to avail himself of this privilege, it behooves him to show that the enhanced value of the soil is inferior to the amount expended for the improvements. The proof in relation to the value of the improvements is contradictory. One witness estimates the clearing, ditching, and fencing, to be worth from \$45 to \$55 per *arpent* ; another from \$55 to \$60 ; and a third from \$60 to \$80. The judge below allowed \$60. As all these valuations appear to us excessive, we must adopt the lowest. Even that is extremely liberal, when it is considered that Bernard has had the use of the wood ; and it is shown that on more than one half of the land cleared, the wood had been *girdled* by Francis Rivas before the purchase. The whole clearing would then amount to \$3150, which sum, added to the \$1000 expended on the sugar mill, makes \$4150, for two-thirds of which the plaintiffs are liable. No evidence, whatever, has been given of the value of the few cabins built by Bernard.

It is, therefore, ordered that the judgment of the District Court be so amended as to allow to the defendant Bernard, only a sum of \$1433 34, instead of \$2133 33, for the balance due for improvements put on the land after deducting the value of rents due by him ; this sum to be paid as provided for in the said judgment, which is hereby affirmed in all other respects. The costs of this appeal to be borne by the appellants.

JOHN EGERTON and another v. THEIR CREDITORS.

Where the creditors of an insolvent do not avail themselves of the privilege allowed them by the act of 29th March, 1826, to fix the terms on which the property surrendered shall be sold, the sale must be made on the terms, and with the formalities prescribed for the sale of property seized in execution. Civ. Code, art. 2180. It must be appraised, and first offered for sale for cash, when, if it cannot be sold for two-thirds of its appraised value, it must be offered, fifteen days after, if immoveable property, on a credit of twelve months. Code Pract. arts. 675, 680, 681. *Aliter*, where the creditors have, under the act of 1826, fixed the terms of sale.

The provision requiring that, in forced sales for cash, the property shall bring two-thirds of its appraised value, was intended for the protection of the debtor, whose property might otherwise be sacrificed. But this danger does not exist, where the creditors of an insolvent, who are interested that the property shall sell for as much as possible, have themselves fixed the terms which they consider the most favorable. In such a case, the syndic is not bound to act with the same strictness as a sheriff acting under a *fi. fa.* He may, like other agents, exercise his discretion, and, under proper circumstances, may suspend the sale, if the property is likely to be sacrificed. Act 20th Feb. 1817.

The sale of an immoveable by the syndic of the creditors of an insolvent, cannot affect the rights of a creditor who never made himself a party to the insolvent proceedings, having a mortgage with a pact *de non alienando*. He may seize and sell the property into whosoever hands it may have passed. But where, by appearing at the meeting of creditors, and fixing the terms of sale of the mortgage property, he has made himself a party to the *concurso*, he will be considered as having waived this right, and must look to the proceeds in the hands of the syndic, whom he has made his agent.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. A piece of ground surrendered by the insolvents, was divided into eleven lots by order of the syndic, and offered for sale for \$1800 cash on each lot, and the balance at six, twelve, eighteen, and twenty-four months. On these terms, which were those fixed by the creditors at their meeting, Saml. C. Ogden, George B. Ogden, and Edward Yorke became the purchasers of all the lots for forty thousand and fifty dollars, a sum exceeding the two-thirds of the appraisement which the syndic had thought proper to have made before the sale. As this property had been purchased by Egerton, subject to an anterior mortgage created by Treat, Plant & Co., who themselves had bought it of Cash and others, under the clause *de non alienando*, the Achafalaya Bank,

Thomas Slidell, and Samuel Thompson, who were holders of the notes of Treat, Plant & Co., executed an act before Marks, the notary, who had prepared the deed of conveyance, ratifying and confirming the sale, and binding themselves never to attempt to impair its force and effect ; but the purchasers having refused to comply with the terms of their purchase, the deed of sale was never signed. Subsequently the syndic advertised the property to be sold at the risk of the purchasers, on the same terms and conditions as before. At this last sale Wm. Florance became the purchaser of one of the lots, for the sum of \$1400. He took a rule on the syndic to show cause why he should transfer the property to him. The syndic moved for, and obtained an order, rendering the Atchafalaya Bank, T. Slidell, and Saml. Thompson, parties defendants to the rule, and notifying them to show cause why the mortgage, existing in their favor on the property sold, should not be rased and cancelled, to enable the syndic to give to the purchaser, the plaintiff in the rule, a free and complete title. The judge having made the rule absolute, the mortgage creditors have appealed. They urge, that the sale to Florance is null, because the property was adjudicated to him for less than two-thirds of its appraised value ; that the first sale not having been complied with, the property should have been sold as if no sale had taken place, and could not, therefore, be adjudicated, if two-thirds of the appraisement were not offered ; that if a non-compliance with the terms of a first sale could dispense with the obligation to sell on credit if two-thirds be not offered, a cash sale could be forced on every occasion. When the creditors do not avail themselves of the privilege allowed them by the statute of 1826, of fixing the terms on which the property surrendered is to be sold, we are of opinion that the sale must be made on the same terms, and under the same formalities, as property seized on execution, Civ. Code, art. 2180. It must be appraised and first offered for sale for cash ; if it does not reach two-thirds of the appraisement, it must then be offered for sale, fifteen days after, at a credit of twelve months. Code Pract. arts. 675, 680, 681. But where, as in the present case, the creditors have themselves fixed the terms of the sale, the rules laid down in the above articles are, in our opinion, wholly inapplicable, because the property can be sold on no other terms. The

provision of law requiring that in forced sales the property shall bring two-thirds of its appraised value, was framed for the protection of the debtor, whose property, it was supposed, might be sacrificed by a cash sale. This danger does not exist where the creditors, who have the greatest interest in selling the property surrendered to them as high as possible, have allowed the credit they deem the most favorable for the sale. The syndic, moreover, is not bound to act with the same strictness as a sheriff levying under a *fi. fa.* He is not, we apprehend, bound to let the property go at any price, but may use his discretion, like other agents, and, under proper circumstances, may suspend or postpone the sale, if the property is likely to be sacrificed. An adjudication having been made to Florance, we think that it is legal and must be carried into effect. Whether the syndic will have an action against the first purchasers, for the difference between the two sales, is a question which we are not called upon to decide in this suit, and upon which, therefore, we express no opinion. But it is urged, on the part of the appellants, that the property, even if legally sold to Florance, has passed into his hands subject to their mortgage, which existed on it when it was acquired by the insolvents; and that, by virtue of the clause *de non alienando*, their rights are the same as if the property had never been sold by Treat, Plant & Co., or any of the subsequent vendors.

This we believe to be true, but only as regards one of the mortgage creditors, Thomas Slidell, who never made himself a party to the insolvent proceedings. By virtue of the pact *de non alienando*, he was, and is still entitled to seize and sell the mortgaged property, into whosoever hands it may pass. 2 Moreau's Dig. p. 433. 5 Mart. 620. 13 La. 314. 15 La. 268. 17 La. 525. The Atchafalaya Bank and Saml. Thompson having made themselves parties to the *concurso*, by appearing at the meeting of the creditors and fixing themselves the terms of the sale of the property subject to their mortgage, must be considered as having waived their right to follow the property, and must look to its proceeds in the hands of the syndic whom they have chosen to make their agent.

We attach no importance and can give no effect to the act of confirmation executed before Marks. That act was evidently based

Brickell and others v. Frisby and others.

upon the contemplated execution of the sale by Yorke and the others, at a price which suited the mortgage creditors. The purchasers having refused to comply with their purchase, the consideration of the confirmatory act totally failed. In fact, the act intended to be ratified was never completed; the ratification, therefore, became void, being without an object.

It is, therefore, ordered that the judgment of the District Court be affirmed as regards the Atchafalaya Bank and Saml. Thompson, and reversed as regards Thomas Slidell; and that the rule taken on him be discharged, with costs; those of this appeal to be paid by the other appellants.

T. Slidell and Hoffman, for the appellants.

Roselius, for the syndic.

SAMUEL BRICKELL and others v. ROSEL FRISBY and others.

Where a collision between steamers or other vessels was the result of accident, the loss must be borne by the party on whom it has fallen. Where both were in fault, the damage must be divided. Where one only was to blame, the whole loss must be borne by him.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. This is an action by the owners of the steam-boat Commerce to recover damages of the owners of the steam-boat Lady of Lyons, alleged to have been caused by a collision in the Mississippi river, by the fault of the officers and crew of the latter boat; and the plaintiffs are appellants from a judgment in favor of the defendants.

We are in the habit of attaching great importance to the decisions of the courts of the first instance in matters of fact, and never reverse them, unless convinced there has been manifest error. Cases like the present, however, differ materially from ordinary ones. Whenever a collision has taken place, the first inquiry is, was it a mere accident—a fortuitous event? If so, the misfor-

tune is to be borne where it fell. If both parties were in fault—if the collision might have been avoided, and more or less blame is imputable to both parties, as in cases of racing, as it is called, then the damage is to be divided. If, on the other hand, one of the boats was in fault, then the damages are to be wholly sustained by it. In the case now before us, we are satisfied that the collision was not a fortuitous event, the result of *vis major*, and the question with us is, whether each boat shall pay equal portions of the damage sustained, or whether the whole ought to fall upon the defendants? It is manifest, that, in a broad river, both boats running up the stream, and in full view of each other, it was easy to avoid a collision, with the least prudence and skill.

Notwithstanding the conflicting testimony in the case, three things are incontestibly proved: *First*, that the Commerce was of superior speed, and at no time out of the line which it had a right to pursue, and might have pursued with safety if the Lady of Lyons had not deviated from her course. *Second*, That at the moment of the collision, the Commerce was in the act of sheering off to avoid the blow, which she received obliquely, at an angle of about thirty-five degrees with the other boat, about the wheel-house. *Third*, That the Lady of Lyons sheered off three different times from her course, so as to run ahead of the Commerce. She was running round a point in rather shallow water, and the Commerce was near the middle of the river.

On the part of the Commerce there was, therefore, the absence of every imaginable motive to run afoul of the other boat. She was able at any moment to pass her, and had done so some days before. On the other hand, there seems to have been, on the part of some of the persons employed on the Lady of Lyons, a disposition to keep ahead, and to thwart the other boat, and prevent her passing. One of the engineers on board the Lady of Lyons very candidly states that, "from the time they left the wood-yard until the collision took place, the Commerce was endeavoring to pass the Lady of Lyons, and we were using all endeavors, as far as our safety permitted, not to let her, and we were keeping as near as could be to the sand-bar; so much so, that at one time I thought she would run on it."

It was in this situation of things, that the Lady of Lyons sheer-

ed off twice, so as to endanger the Commerce if she had continued her course. The pilot was heard to exclaim, "you can't come it," or words to that effect, and on the third occasion of sheering, the two boats came in contact. There was a loud laugh on board the Lady of Lyons. The excuse for sheering was, that boats running in shallow water are apt to do so, and that seems to be admitted. But it is difficult to believe that the sheering off to such an extent, and so repeatedly, was occasioned by an uncontrollable disposition of the boat to run off into deeper water, especially when it is admitted by the captain that their running so near the sand-bank was to prevent the Commerce from passing. The account which the engineer of the Lady of Lyons gives of the collision and the cause of it, does not appear to us satisfactory, nor even consistent with itself. It is shown by evidence, which is not contradicted, that the same pilot had run the boat across the track of the Commerce some days before, on the same voyage. He is shown to be a man addicted to the use of intoxicating liquors. It is in a great measure the inordinate use of such liquors, and the excitement and wrecklessness which it generates among men connected with steamboats, that we must attribute the disgraceful fact, that the navigation of the broad and tranquil rivers of the west and south-west, has become more dangerous, and costs annually a greater waste of human life, than that of the Atlantic ocean, with all its currents, and storms, and rock-bound coasts. It is time that an example should be made. It is time that those who are interested in this business should be taught by exemplary damages, if they cannot be reached in any other way, that they cannot sport with impunity with the lives of those who, from necessity, trust to their skill and prudence; and that if they employ intemperate and reckless men in the management of their boats, they must take the consequences. A cursory reading of the evidence left a decided impression upon our minds that the collision was attributable to the fault of the Lady of Lyons, and a more minute examination and analysis of the whole of it, has confirmed that impression. We regret that the evidence is not sufficient to enable us to pronounce at once upon the *quantum* of damages; but it is perhaps best that it should be left to a more appropriate tribunal, a jury of the country.

Brandagee v Chamberlin and another.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed; that the cause be remanded for a new trial; and that the appellees pay the costs of the appeal.

Peyton, for the appellants.

Hooper, for the defendants.

JACOB BRANDAGEE v. T. G. CHAMBERLIN and another.

Arts. 91 and 156 of the Code of Practice, which provide that if, in order to give jurisdiction to the court, one demand less than is really due, and do not amend his petition and augment the demand, he shall be presumed to have remitted the surplus, relate to the reduction of an entire sum, as where the claim exceeds the jurisdiction of the court, and is reduced so as to bring it within it. But where an amount is payable in instalments, as rent at fixed periods, a conjunctive obligation is created, and each instalment may be paid or enforced separately. So where four monthly instalments of rent are due, a suit for the amount due for the last month, will not release the lessee from the obligation to pay the rent due for preceding months.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. The plaintiff claims four months' rent of a store, during the months of June, July, August and September, 1836. The defendants, showing that the plaintiff had, in the month of November, 1836, sued for and recovered judgment in the City Court, for the rent of the month of May, 1836, excepted to the plaintiff's right of action, on the ground that the rent now claimed, if ever due at all, was due on the 23d of November, 1836, when he instituted a suit in the City Court for the rent of the month of May preceding, and that the plaintiff having then forborne to claim the rent for the four following months, now demanded, has forfeited all his rights thereto. The exception was sustained, the action dismissed, and the plaintiff has appealed. The Parish Court relied on the Code of Practice, arts. 91 and 156. The first provides that "if one, in order to give jurisdiction to a judge, demand a sum below that which is really due to him, he shall be presumed to have remitted the overplus, and after having obtained judgment for the sum he had claimed, he shall lose all right of action for

that overplus." The last directs, that "if one demand less than is due him, and do not amend his petition, in order to augment his demand, he shall lose the overplus."

It appears to us that the judge erred. The articles he has referred us to, evidently relate to the reduction of an entire sum, as where the claim is above the jurisdiction of the court, and is reduced to the sum suable for there. Neither of the articles relate to sums due at different times, and demandable separately. The Civil Code places this beyond doubt. Article 2060 provides, that "where a sum is promised to be paid at different instalments, a conjunctive obligation is created, and the payment may be *severally paid or enforced*. Rents, payable at fixed periods, come also under this rule." The lease on which the present suit is brought, is for a rent of twenty-four hundred dollars per annum, payable *monthly*; which does not differ from a rent of two hundred dollars per month. Such is the jurisprudence of France. Toullier informs us, that "the arrearages of an annuity, or a rent, and the interests of a sum, form as many debts as there are periods of payment. *Droit Civil Français*, p. 719, sec. 688, Tit. Des Obligations Conjonctives, &c."

It is, therefore, ordered that the judgment be reversed, the exception overruled, and the case remanded for further proceedings, according to law, on the other pleas of the defendants; the costs of the appeal, to be borne by the defendants and appellees.

G. *Strawbridge*, for the appellant.

No counsel appeared for the defendants.

First Municipality of New Orleans v. The Orleans Theatre Company.

THE FIRST MUNICIPALITY OF THE CITY OF NEW ORLEANS v.
THE ORLEANS THEATRE COMPANY.

A subscription by a municipal corporation, to the stock of an incorporated company, though unauthorized by the charter of the municipality, will be binding on it if subsequently sanctioned by the legislature.

A stockholder in a company cannot avail himself of the misbehavior of the corporation, in not investing its capital stock according to the charter, to avoid his own contract. Sect. 3 of the act of 25th March, 1831, which provides that where an injunction is dissolved, the plaintiff and surety, shall be condemned, *in solido*, to pay interest at ten per cent a year on the amount of the judgment, and not more than twenty per cent damages unless a greater amount be proved, applies only where judgments have been enjoined.

Damage occasioned by the institution of the suit, cannot be pleaded in reconvention. Where defendant has been injured, the remedy is by action on the bond.

APPEAL from the District Court of the First District, *Buchanan*, J.

GARLAND, J. It appears that in the month of November, 1836, the Council of Municipality, No. 1, adopted a resolution, by a vote of more than two-thirds, whereby the Mayor, notwithstanding his veto, was authorized and required to subscribe \$200,000, to the capital of the New Orleans Theatre Company, in shares of one hundred dollars each. To pay this subscription, the Mayor was directed to give to the directors of the Company, four hundred bonds of the Municipality for \$500 each, payable thirty years after date, bearing interest at the rate of six per cent per annum, payable semi-annually, it being well understood, that the Municipality was to have the right of property in the sum subscribed, and all the benefits made by the Company annually, from the time the subscription books were opened. The Orleans Theatre Company had been incorporated by the legislature in the month of March, 1836, and the object of the Council in making this subscription, is stated to have been to aid in the construction of a large theatre in the Municipality, which would contribute to its wealth and embellishment, and afford a place of relaxation and amusement, that would tend to correct the morals and enlighten the minds of the citizens. In the month of March, 1837, the legislature passed an act, whereby the First Municipality was recognized as stockholders in the

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Company, and were authorized to appoint three directors annually, to have all the power and authority of other directors of the Company, and said Company were authorized to take marine and fire risks in the same manner as the Merchant's Insurance Company. Acts 1837, p. 82, secs. 1, 2, 3. Two hundred and fifty thousand dollars of the capital of the Company, were, by this act, set apart to guaranty marine and fire risks, to make up which the bonds of the Municipality were specially set apart by the directors, and one-half of them have been pledged to Lizardi & Co. to secure the payment of a large debt owing to them. The affairs of the Company have, ever since the last act of the legislature, been managed by a board of nine directors, of whom three were appointed by the Council of the First Municipality. In 1838 a dividend was made, and the sum of \$6000 was paid into the treasury of the Municipality, as its portion of the profits. Before the Municipality subscribed the \$200,000, the Orleans Theatre Company had purchased the present Orleans Theatre, and had commenced insurance operations, which last were subsequently authorized by the legislature as before stated.

This suit is now brought to annul the subscription made in obedience to the resolution of the Council in 1836, to recover back the bonds issued in conformity thereto, and the sum of \$16,500 paid as interest on them, on the grounds that the Council in 1836 had no right or authority to pass the resolution directing the subscription to the stock, that the power delegated to the said assembly was transcended and violated, whereby the act or resolution had become void and of no binding force. It is further alleged, that the resolution is of no effect, as the Company have abandoned the intention of erecting a new theatre, and have purchased the old one, which has been repaired at a heavy expense. The defendants aver that the resolution of the Council authorizing the subscription of \$200,000 is legal and binding; that the bonds have been appropriated in the manner authorized by law, and are vested in the corporation of which the plaintiffs are members; that contracts with third persons have been based on the faith of them; that the intention of building a new theatre is not abandoned, but is and has been delayed by the institution of this suit, which has much injured the Company in its credit and resources and occas-

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ioned them much damage ; and, further, that the plaintiffs have not in any way called on them to build the same, although represented in the board of directors. It is, therefore, prayed that there be a judgment in favor of the defendants ; that the injunction restraining the sale of the bonds be dissolved, with \$40,000 damages for the injury caused by it and the other proceedings in this suit.

The Municipality, No. 1, is a civil corporation, substituted by law for the persons who reside within its limits, for purposes of temporal police, and represents the interests, rights and privileges of the people as a single whole. It follows, therefore, that this corporation can possess an estate, have a common treasury, is capable of receiving legacies and donations ; that it can make valid contracts, obligate others, and obligate itself towards others ; exercise the rights which belong to the citizens as an aggregate ; manage their own affairs, appear in courts of justice, and make such laws and regulations for their government as may seem proper, provided no law of the state or of the United States be violated. Civ. Code, arts. 422, 424. As it is an intellectual being, it cannot transact what it is authorized to do, except by some of its members, chosen by the others, who are intrusted with the direction and care of their affairs, according to the statutes and qualities of such corporation ; and the acts of such officers or agents bind the corporation in all such things as do not exceed the limits of the administration which is intrusted to them. Civ. Code, arts. 429, 430.

The Municipality, No. 1, was created by an act of the legislature, approved March 8th, 1836. It is to be governed and its affairs administered by a Recorder, and Common Council elected by the qualified voters. As a corporation it is capable of suing and being sued, of acquiring by onerous or gratuitous title all kinds of property real, personal, or mixed ; it can alienate, mortgage, enjoy, or otherwise dispose of the same, and can generally exercise, within its limits, all the powers, rights and privileges which were possessed by the former corporation of New Orleans. B. & C. Dig. 123, secs. 4, 5. In relation to the acquisition and disposition of property, this law confers powers as plenary, or nearly so, as are possessed by an individual.

We shall now briefly examine the powers conferred upon and exercised by the former corporation of New Orleans. By the 1st

and 6th sections of the act of 1805, B. and C. Digest, p. 92, 93, that corporation had the power of holding and conveying any estate, real or personal, for the use of the same, and had "power to make and pass all by-laws and ordinances for the better government of the affairs of the corporation." By the act of March, 14th, 1816, B. and C. Digest, p. 101, sec. 1, a variety of special purposes were mentioned, in relation to which the council had full power and authority to make and pass laws and ordinances; and one power was, "to permit or to forbid theatres, balls, or other public amusements." Various other powers were conferred by other acts of the legislature, in relation to the acquisition and disposition of property, real and personal, which it is not necessary now particularly to notice, nor is it very material now to comment on the powers granted, as it appears clear to us, that if the legislature did not authorize the Municipality in the first instance to subscribe for stock in the Theatre Company, it sanctioned the act afterwards, and has thereby made the subscription obligatory, and the discharge of the bonds a contract not to be violated.

After the Theatre Company was incorporated, the authorized agents of the Municipality directed a subscription for stock to the amount stated. It is admitted that it was known before this subscription was made, that the Theatre Company had purchased the Orleans Theatre, and were engaged in taking fire and marine risks as an insurance company. On the 11th of March, 1837, not four months after the subscription now complained of, the legislature, with the full knowledge of the members representing the Municipality, in our opinion ratified the act of the Council in ordering the subscription, by conferring additional powers upon the Company, and securing to the Municipality a representation of three directors in the board, independent of all control on the part of the other stockholders. Acts 1837, p. 82; secs. 1, 2, 3. We cannot doubt but that at the time this law was passed, it was well known that the Municipality No. One was a stockholder for \$200,000, and that the legislature intended to confirm the subscription if there was any doubt previously as to its legality, and that, by authorizing the Council to appoint three directors, it was intended to secure their interests, or afford them a chance of protection, independent of the influence that might be exercised by directors chosen by other stockholders.

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The counsel for the Municipality has insisted that the act of the legislature is retrospective in its operation, and is not binding on the present Council, nor on that which commenced this suit. Whether there was any change in the members of the Council that authorized the subscription of the \$200,000, and accepted the provisions of the act of the legislature referred to, does not appear, nor is it material to inquire. The Municipality exists at all times in contemplation of law, and among its most important qualities are its immortality and individuality, properties by which a perpetual succession of many persons are considered the same persons, and may act as a single individual. These qualities enable a corporation to manage its affairs, and hold its property, without the intricacies, hazards, and perplexities incident to conveyances from one to another. The subsequent members of the Council are to be considered as knowing all the circumstances known to their predecessors in relation to this transaction, and, having accepted the act of the legislature, we hold it as binding as though the subscription had succeeded the act of March 11th, 1837.

The counsel for the plaintiffs insists that the Municipality ought to be discharged from its contract, as the Theatre Company has not applied its capital to the purposes contemplated when the subscription was made, to wit, to the building of a theatre. To this the defendants reply that they are prevented from so applying the funds of the Company, by the action of the Municipality; but a more conclusive answer is, that a stockholder in a company cannot avail himself of the misbehavior of the corporation, in not investing the capital stock according to the charter, to avoid his own contract. Whether for such conduct of the corporation, the State might not deprive it of its franchises upon due process, or a stockholder proceed for a specific performance in a legal manner, we will not now determine.

Upon a full consideration of the case, we cannot concur with the judge of the District Court in annulling this contract, and ordering the bonds issued by the Municipality to be restored and cancelled. Whatever may be our opinion as to the policy that dictated this measure, we are constrained to say it is sanctioned by law, and cannot be now repudiated.

The defendants pray for a dissolution of the injunction with

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20 per cent damages, and forty thousand dollars damages by way of reconvention. We have repeatedly held that the act of 1831 in relation to interest and damages, does not apply to a case like the present; and we have also decided, on several occasions, that a demand in reconvention for damages caused by the institution of a suit, cannot be maintained at the same time with the suit. If the party has suffered any injury, the remedy is on the injunction bond.

The judgment of the District Court is reversed, and we order and decree that there be a judgment in favor of the defendants, that the injunction issued herein be dissolved, and the plea in reconvention dismissed, without prejudice to the claim for damages; the plaintiff paying costs in both courts.

Roselius and Preston, for the plaintiffs.

Eustis and Grymes, for the appellants.

THE MERCHANTS' BANK OF NEW ORLEANS v. SAMUEL JARVIS
PETERS and others.

A sheriff, to whom an order for the seizure and sale of mortgaged property has been directed, has no authority to receive the amount of any other mortgage, nor any other sum than that which the writ commands him to make. If he take upon himself to receive money, not authorized by the writ, and to pay it over to persons not parties to the process, he does not act officially, and the sureties on his bond will not be responsible for his conduct. The purchaser, in paying to him what he had a right to retain, trusts him personally.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The facts in this case are admitted to be, that the plaintiffs held one of a set of notes secured by mortgage, and Prudhomme another. Prudhomme sued out an order of seizure and sale, the property was sold by Hozey, the sheriff, and the whole price of \$20,000 was paid to the sheriff by the purchasers. The plaintiffs took a rule upon the sheriff to show cause why he should not be condemned to pay the amount due them on their mortgage note, with twenty per cent damages. It was decreed accordingly, and execution was issued against the sheriff. The

Merchants Bank was not a party to the proceedings provoked by Prudhomme, and the sheriff returned that the property was sold under Prudhomme's writ.

On this state of facts, the question arises, whether the sureties of the sheriff are liable for the sum received of the purchasers, and not paid over to the plaintiffs in this case as the holders of another instalment of the same mortgage.

The writ in the hands of the sheriff directed him to make out of the mortgaged premises the amount due to the seizing creditor, Prudhomme. If, in selling for that purpose, he ascertains that other mortgages or privileges exist on the property, his mode of proceeding is pointed out by various articles of the Code of Practice. He is to produce and read a certificate of mortgages. If the property be subject to a mortgage or privilege, the sheriff shall give notice, that the property is sold subject to all privileges and mortgages, with the condition that the purchaser shall pay into his hands whatever portion of the price for which the property shall be adjudicated, which may exceed the amount of the privileges and *special mortgages* to which such property is subject. Arts. 678, 679.

According to article 683, if there exists on the property any privileges, or special mortgages in favor of other persons, and which have a preference, the purchaser is entitled to retain in his hands, out of the price for which the property was adjudicated, the necessary amount to satisfy such mortgages; and, consequently, according to the next article, if the bid does not exceed the amount of such incumbrances, there can be no sale.

There is no provision of the existing law which requires of the sheriff, or authorizes him to receive the amount of other mortgages, or any other sum than that which his writ commands him to make on the execution. If he takes upon himself to receive money, which his writ does not authorize him to receive, and to pay it over to persons not parties to the process in his hands, it is plain that he does not act officially, and, consequently, the sureties on his official bond are not responsible. His authority to receive from the purchasers any thing more than what was due to the plaintiff is not shown, and the purchasers trusted the sheriff personally when they paid to him what they had a right to retain for the

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plaintiffs, in the present case, in discharge of their mortgage. 16 La. 163.

It is, therefore, adjudged and decreed, that the judgment of the Commercial Court be reversed ; and ours is for the defendants, with costs in both courts.

T. Slidell, for the plaintiffs.

Micou and Preston, for the appellants.

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THE SAME v. THE SAME.

A balance due on an unsettled account cannot be pleaded in compensation in an action on a promissory note ; nor in reconvention, when unconnected with the plaintiff's claim. It must be sued for in a direct action.

Pleas in reconvention must be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were plaintiff in a direct action.

APPEAL from the City Court of New Orleans, *Cooley, J.*

Janin, for the plaintiff.

Schmidt, for the appellant.

MARTIN, J. These two cases are of the same nature, and have been presented to us and argued together. The first is on two small notes, given by the defendant to the plaintiff, and taken up by the latter after protest. The second, is on a note of one thousand dollars, in the same situation. In the record of the second suit, is that of another brought by the same plaintiff against the same defendant, in the same court, in a due bill for nine hundred and fifty dollars, and of another in the Commercial Court on a promissory note for thirteen hundred and twenty-five dollars. The defendant answers in all these suits, that there have been, for several years, running accounts between the parties, unsettled since the year 1839, on which there is a balance in his favor of fifteen hundred and fifty-two dollars. On this answer being ordered to be stricken out, he pleaded payment.

The plaintiff had judgment on the notes, for one hundred and seventy-two dollars, two hundred and thirty-eight dollars, and

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one thousand dollars, with interest, and costs of protest; and the defendant has appealed. His counsel has complained that the judge erred in ordering the answer to be stricken out. It appears to us that he did not err. The answer can only be considered as a plea of compensation, or one in reconvention. In the first case, compensation could not be admitted, because what it was based on was absolutely unliquidated; and the plaintiff's demand being on promissory notes of the defendant, was of the most liquidated kind. As a plea in reconvention, the defendant could not be permitted to offer a claim absolutely unconnected with that of his adversary. It does not appear to us that the judge erred in considering the plea of payment as totally unsupported. If the defendant had accounts on which a balance was due him, having forborne to demand it in a direct action, he could not expect to be permitted to thwart the plaintiffs' progress in the two cases before us. Even if the balance could be offered in reconvention, it ought to have been rejected, because the allegation was not specific, but too general. In the case of *White v. Moreno*, 17 La. 372, we held that "pleas in reconvention should be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them, were himself a plaintiff in a direct action."

Judgment affirmed.

WILLIAM LANGFITT and others v. THE CLINTON AND PORT
HUDSON RAIL ROAD COMPANY.

On the trial of an exception to the petition, and during the argument of defendants' counsel, plaintiffs offered in evidence letters of tutorship and administration, which were excepted to as too late. The bill of exceptions did not expressly state whether the evidence had been closed. *Held*, that such an objection is a weak one; and that the bill of exceptions should have stated all the circumstances with particularity, to enable the court to determine whether the evidence ought to have been excluded on a ground purely technical. Objection overruled.

In an action against a Company, plaintiffs introduced witnesses who proved, without objection, that they had been appointed engineers of the Company by a written resolution of the Board of Directors. On a motion to strike out the evidence, on the

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ground that parol evidence of the appointment was inadmissible : *Held*, that the testimony having been received without objection, and defendants having it in their power to offer in evidence the resolutions and contract with the witnesses, if material to their defence, the motion was correctly overruled.

Action for a balance due on a contract, by which plaintiffs undertook to construct a railway, the defendants, the other contracting party, agreeing to supply the lumber, and for damages for loss sustained by plaintiffs in consequence of defendants' failure to furnish the lumber. Plea in reconvention that plaintiffs had, by a subsequent contract, bound themselves to furnish the lumber. *Held*, that though different from the main action, the demand in reconvention was incidental to the claim for damages, within the meaning of arts. 374, 375, of the Code of Practice.

In an action on a joint contract, the individual debt of one joint contractor may be pleaded in compensation of his share in the joint contract.

It is no objection to a witness, offered to prove the defective construction of a railway, that he is not a professional engineer. His testimony is admissible, and should be left to the jury for what it is worth.

APPEAL from the District Court of East Feliciana, *Johnson, J.*

GARLAND, J. Langfitt and Perry, and Ann M. Boatner, the widow of Elias Boatner, deceased, and tutrix of his minor children, and James W. Boatner, a major heir of Elias, institute this action, alleging that Elias Boatner, in his lifetime, together with Langfitt and Perry, and A. G. Carter, entered into a contract with the defendants, whereby they agreed to construct so much of the superstructure of the rail road, then being made from Port Hudson to Clinton, with a lateral branch to Jackson, as had not already been contracted for by Concross, Davis & Co. The defendants were to pay at the rate of \$2500 per mile for the work ; \$700 on the completion of each mile, and \$1800 per mile when the whole should be finished. The work, they aver, has been completed according to the specification agreed upon and received by the company, measuring nineteen miles and one hundred and fifty-six chains.

It is alleged that, sometime after this contract was made, Carter assigned all his interest in it to Langfitt and Perry, who agreed to perform his part of it. Plaintiffs claim the sum of \$49,937 50, and the amount of a bill for extra work and materials furnished, amounting to \$2552 85 ; \$1000 for the transportation of mud sills, which the defendants were to furnish ; and \$5000 damages for losses incurred by the failure of the defendants to furnish lumber on the bank of the Mississippi for the construction of the road, which they were bound to do, whereby their workmen, hands,

and themselves lost much time at different periods, and incurred heavy expenses, which several sums make \$8552 85. They further claim the sum of \$5000, it being the penalty stipulated in the contract for a failure to comply with it; the whole amounting to \$63,491 25, subject to certain credits.

The contract to execute the work, it is alleged, is duly recorded, and a privilege on the work is claimed for whatever is due.

The defendants deny the right of Ann M. Boatner to prosecute the suit, or to stand in judgment. They plead a general denial. They admit the contract set forth, but aver that the work has not been completed; that so far as it has been finished, it is not executed according to the terms of the contract, but is defective throughout; that the superstructure is badly laid, the mud sills not of proper materials; that the width of the road is unequal, the string pieces not level, and neither they nor the iron rails properly fastened, by reason of which the use of the road is interrupted and inconvenient.

A plea of payment, to the amount of \$30,000, is presented. They allege that said payments were made in error, and that the road was used in error before the defects were discovered. It is further answered, that the defendants made a contract with the plaintiffs, in their own right, and as assignees of Carter, whereby the latter engaged to furnish the lumber for the use and construction of the road, undertaken to be built by them, which they failed to do, in consequence of which the construction of the road was much delayed, and the defendants obliged to send a great distance to procure materials, at a heavy expense, to their damage \$10,000. They, therefore, pray, by way of reconvention, for the sum of \$30,000 paid in error, for \$10,000 damages for a failure to comply with this last contract, and for \$5000, the penalty mentioned in the first named contract.

Sometime after the filing of this answer, James W. Boatner prayed to become a party, as administrator of the estate of his father, Elias Boatner, he having been appointed administrator of his estate, accepted with benefit of inventory, since the institution of the suit, which was permitted. The defendants then filed various exceptions to the action :

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First. That the contract is a joint obligation, and that all the parties to it are not parties to the suit, nor properly presented.

Second. That A. M. Boatner had no right to appear.

Third. That in the original petition, J. W. Boatner appears as an heir, and in his supplemental petition as administrator of his father's estate, which characters are inconsistent with each other.

Fourth. That Langfitt and Perry have no right to prosecute the suit, as they show that there are other persons connected with them who are not parties. These exceptions seem to have been overruled.

The defendants, availing themselves of J. W. Boatner's supplemental petition, filed an amended answer, in which, in addition to what had been previously alleged, they deny Boatner's right to represent his father's estate, aver that Carter ought to be made a party, against whom they have claims which they are entitled to plead in compensation, if any thing be due on the contract; that the work was not completed at the time this suit was instituted, and, so far as it had been finished, that it was not done in a workmanlike manner. Payments to a large amount were alleged to have been made during the progress of the work, which were reclaimed, as made in error. The contract made by Carter, Boatner and Perry, to furnish the timber on the bank of the river, is again advanced, with an allegation of an assignment of Carter's interest to Langfitt, which contract was violated, and \$10,000 damages claimed. In consequence of the delay caused by this breach of contract, the defendants allege that they were kept out of the profits and revenues of the road, to their damage \$20,000. The penalty of \$5000 in each contract, is also claimed. The defendants further aver, that if the plaintiffs suffered any damages by delay, for want of materials and lumber, it was caused by their failure to furnish it. The defendants further answer, that if this suit can be maintained without Carter being made a party, nothing can be recovered in his right, as the defendants have liquidated demands against him, which will more than pay his portion, and which they plead in compensation. They further plead compensation against the demand of Boatner's estate, for more than his portion, which he agreed, in his lifetime, should be so settled.

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The answer concludes by a demand in reconvention for \$10,000 paid in error, and \$10,000 more for breaches of the contract to furnish lumber and timber; and, if any thing should be found owing to any of the plaintiffs, it is prayed that it may be compensated by the demands presented against the said plaintiffs and Carter.

Upon these pleadings the parties went to trial. After a long examination of witnesses a verdict was given in favor of the plaintiffs for \$29,840 92, with 10 per cent interest from the 22d June, 1840, with a privilege on the rail road, on which judgment was rendered, and also for the sum of \$1925 97 for extra work. On the plea in reconvention, a judgment was given in favor of the plaintiffs, from which the defendants have appealed.

The record shows about the average number of bills of exception in cases from the third judicial district, to wit, fourteen. Several of them it will be only necessary to notice very briefly.

The first states, that on the trial of the exceptions, and during the argument of the defendants' counsel on them, the plaintiffs offered in evidence the letters of tutorship given to A. M. Boatner, and the letters of administration granted to James W. Boatner, then on file, which were objected to by the defendants as coming too late, but that they were admitted. As the bill of exceptions states the point, we cannot say that the court erred. The evidence was offered on the trial and during the argument, but whether the evidence had been finally closed by the parties does not appear. It is rather a feeble objection to legal evidence, that it is offered too late on the trial, and all the circumstances should be particularly stated to enable the court to judge whether it ought to be excluded by an objection purely technical.

The second bill of exceptions, is to allowing the sheriff to amend his return. The defendant gives no reason why it should not have been permitted, and we cannot say that the court erred.

The third bill states that the defendants' counsel moved the court to strike out that part of the testimony of Thorn and Cornwall, which went to prove that they were appointed engineers on the railroad, and were authorized by the defendants to receive the work executed by the plaintiffs, on the ground that the appointments were made by written resolutions of the Board of Direct-

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ors, and that a contract existed between them and Thorn, which ought to have been produced, and that no parol proof of such appointment could be given. We think the court did not err. In the first place, the testimony had been given and taken down without objection; and secondly, the plaintiffs were not the keepers of the defendants' resolutions and contracts. If they had deemed the resolutions and contract with Thorn material to their defence, or necessary to contradict or explain any thing stated, it was in their power to have produced and offered them.

The fourth bill of exceptions of the defendants was taken to the refusal of the court to permit Geo. W. Northam to be examined as a witness, to prove that the defendants had legally put the plaintiffs (the Saw Mill Company) in default on their contract with the Railroad Company to deliver the lumber specified in contract H; and whether he was present, with another witness, when a committee of the Directors made a demand on the plaintiffs (forming the Saw Mill Company) to perform that contract. To this question the plaintiffs objected, on the ground that the plea in reconvention set up by the defendants is on a contract different and independent of that sued on; that it is not incidental to or growing out of it, but antecedent. In refusing to receive this testimony, we think the court erred. When the plaintiffs' demands are examined, it will be seen that they claim \$5000 for expenses incurred and time lost, in consequence of the necessary lumber and materials not having been furnished by the defendants, while the latter say if this be so, it was in consequence of the plaintiffs themselves neglecting and refusing to comply with another contract, by which they were themselves to supply all such materials and lumber, and that one contract was dependent on the other. It is shown that Boatner, Carter and Perry first contracted to furnish the necessary lumber; that afterwards, with Langfitt, they undertook to make the road, and that shortly after Langfitt and Perry purchased Carter's interest in both contracts, and agreed to perform them. We are, therefore, of opinion that the court erred in refusing to receive evidence on the plea in reconvention. The demand, although different from the main action, is, it appears to us, incidental to the plaintiff's claim for \$5000 damages, and comes within the spirit of the articles 374, 375 of the Code of Practice. It does not appear

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to us material that Langfitt was not originally a party to this contract, as he subsequently became the assignee of a part of Carter's rights; and it is to his neglect or fault, since the assignment, that the breach of contract is assignable. He is *quoad hoc* in the place of Carter.

The fifth bill of exceptions by the defendants, is to the court receiving the document B. in evidence, on the ground that they were not parties to it. We think the court did not err. The document is the transfer from Carter to Langfitt and Perry, of his interest in the two contracts which was set up in the petition, and was necessary to establish their right to recover his share, or rather to show that it was vested in them.

The sixth bill of exceptions states that on the trial the defendants, to support their plea of compensation against the virile portion of Robert Perry, in the contract, offered in evidence two notes of Perry, marked A. and B., amounting to \$1400, the signatures to which were admitted. These were objected to by the plaintiffs on the ground, that the individual debt of one of the plaintiffs to the defendants, cannot be given in evidence to compensate the virile portion of one of the plaintiffs, where all are interested in the contract as ordinary and particular partners. The court sustained the objection, and refused to receive the notes in compensation. In this we think the judge erred. The plaintiffs do not any where, either in their pleadings or in the contracts, show that they were partners in any description of partnership known to the law. They are co-contractors or joint obligors, each entitled to his particular share or portion, and as such, we are of opinion that the individual debt of any one of them may be compensated against his share or virile portion.

The seventh bill of exceptions is taken by the defendants to the refusal of the court to permit them, on the cross-examination of Thomas Montgomery, to ask whether the work done by the plaintiffs on the rail road was good or bad, or done in a workmanlike manner, or in conformity to the contract, the witness having had experience in the construction of rail roads, though not a professional engineer. We think the judge erred. It is shown that Montgomery had, for a number of years, been engaged in the construction of rail roads, either as a contractor or superintendent, but was

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never employed as an engineer. His opinion, we think, might have been taken, and left to the jury for what it was worth. The fact of not being a professional engineer does not prevent a man from being examined as a witness, although his opinion may not have as much weight as that of one who is a professional engineer.

The eighth bill of exceptions is the same with the third, and we think the court did not err in relation to it.

The ninth bill it is not material to notice, further than to say, that we see no error in admitting the letters testamentary to James W. Boatner to be read as evidence.

The question raised by the tenth bill of exceptions seems to us decided by the view we have taken of the fourth, and that by the eleventh is the same as in the seventh. The twelfth bill is settled by our opinion on the third.

The thirteenth bill of exceptions is to the refusal of the court to permit the liabilities of A. G. Carter to the defendants, to be offered and pleaded in compensation to the demand of the plaintiffs, on the ground that Carter was no party to this suit, and that suits had been instituted on the notes offered against him which were then pending and undetermined. We think the court did not err. It is true that Carter was originally a party to the contract, but he had, previous to his liability on the notes offered in compensation, transferred all his interest in the contract to Langfitt and Perry. Whether the defendants had notice of this transfer is not shown; but in their answer they do not set forth, as specifically as they should, this claim for compensation, so as to put the plaintiffs, Langfitt and Perry, on their guard, and enable them to show a notice of the assignment, after which the liabilities of Carter could not be compensated against them.*

The fourteenth and last bill of exceptions, was taken to the rejection of J. S. R. Guay, as a witness, who was offered by the

* The record shows that the transfer was made on the 1st September, 1838. Three of the five notes, on which Carter was endorser, pleaded in compensation, are stated in the account annexed to the supplemental answer to have become due, one on the 25th Oct., 1837, another on the 3d Jan'y, 1838, and the third on the 24th of February of that year. The periods at which the other two fell due, are not mentioned.

defendants to prove that the work was defectively constructed by the plaintiffs. The court rejected the witness on the ground that he was a mortgage stockholder in the Company, notwithstanding he offered to relinquish his stock, and admitted that his cash stock had been forfeited. We do not think the court erred in rejecting the witness. He was a stockholder when he offered to testify, and a mere offer to relinquish his mortgage stock, not accepted by any one, we cannot consider as such a discharge of liability as would qualify the witness to testify.

The judgment of the District Court is, therefore, annulled, the verdict of the jury set aside, and the case remanded for a new trial, with directions to the District Judge in admitting or rejecting witnesses or evidence, to conform to the principles set forth herein, and otherwise to proceed according to law; the plaintiffs and appellees paying the costs of the appeal.

Dunn and Andrews, for the plaintiffs.

Lyons and Muse, for the appellants.

JOHN J. WHERRY v. JOHN M. BELL.

The purchaser, at a judicial sale of the property of a succession sold for a debt due by the ancestor, will, where the proceedings have been fairly conducted, acquire a title good against an heir who may subsequently make himself known.

An heir to whose benefit the payment, by a third person, of a debt due by the ancestor, has enured, will be bound to refund the amount.

A wife can in no case sell to her husband, or contract towards him the obligations of a vendor, though the husband may, in some cases, sell to her. She cannot, consequently, be cited in warranty by the representative of her deceased husband.

APPEAL from the District Court of West Feliciana, *Dawson*, J., presiding.

BULLARD, J. The plaintiff represents that, in the right of his mother, he is entitled to one undivided half of the estate of John Brown, deceased without heirs in the ascending or descending line, and that Emily C. Davis, and Evelina Wherry, the petitioner's mother, were Brown's nieces and next of kin in the collateral line.

He represents that after the death of John Brown, Emily C. Davis took possession of his estate, that no inventory was ever made, and that she continued to possess the land and slaves belonging to the estate until lately, when it was sold at the probate sale of the succession of Green B. Davis. That a tract of land and several slaves, whom he names, were purchased by J. M. Bell, who now holds and detains the same. He avers that the sale was in derogation of his rights; that no partition had ever taken place between him and Emily C. Davis; and that the sale is null and void. He, therefore, brings this revocatory action, and prays that the sale may be declared void, and that an undivided half may be adjudged to him as representing his mother.

The defendant, after setting up an exception which need not be further noticed, answered that he purchased the land and slaves as alleged, and supposed that he had acquired a good title to the same; that he knows nothing of the family of John Brown, nor who were his heirs. He prays that Hall, the syndic and representative of the estate of Davis, may be cited in warranty.

The syndic, after uniting with the defendant in his exception, answered, that he admits the purchase by Bell at the probate sale, and expressly denies the plaintiff's heirship, but avers that Emily C. Davis, the wife of G. B. Davis, resided on the plantation, and had possession of the land and slaves as the sole heir of John Brown; that his estate was, on the 7th of May, 1827, indebted to Nathaniel Cox in the sum of \$12,141 17, for advances made to Brown's estate, for which he brought suit against E. C. Davis and her husband, in which he alleged E. C. Davis to be the sole heir and to have made herself liable for the debts, and that in her answer she admitted the justice of the demand, and that she had applied the moneys of the estate to her use; that judgment was recovered accordingly for \$6,945 41; that the defendants agreed to pay interest on the judgment at the rate of eight per cent, and that the plaintiff gave five years time to pay it in; that by agreement a *fiery facias* was issued on the judgment in September, 1827; that in virtue thereof the tract of land and slaves were seized, and G. B. Davis became the purchaser for the sum of \$7,356, in conformity to the agreement. The syndic further avers, that the estate of G. B. Davis is indebted to that of Nathaniel Cox in the

sum of \$14,883, including the aforesaid judgment, which still remains unpaid, and for which the plaintiff would be justly liable in case of his being declared the heir of John Brown; and he further prays that Emily C. Davis may be called in warranty.

It appears that John Brown, whose estate is in question, left one sister, who had three children, E. C. Davis, William, and John Johnson; and the plaintiff is the grandson of another sister previously deceased. The two Johnsons and their sister were the nephews and niece of Brown, and Wherry, the plaintiff, was the grand-nephew, who, it was discovered, was entitled, under the Code of 1808, to concur in the succession in right of representation of his mother. But when the two Johnsons died afterwards, their inheritance fell to their nearest relative, E. C. Davis, their sister. Wherry, therefore, does not claim through them, and cannot therefore be estopped by any act of theirs in their lifetime. He is not their heir, although the co-heir with them of his grand-uncle.

We have stated the substance of the pleadings, which are exceedingly verbose and loaded with irrelevant matters, without noticing many incidents which do not appear to us important. It was more than intimated in the argument in this court, that the difficulty arose in a great measure, if not wholly, from a misconception of the law of succession, in supposing that the grand-nephews do not come in as collateral heirs by representation of their deceased parent, and that E. C. Davis, and her two brothers, were the sole heirs of Brown. The plaintiff appears to have been ignorant, in point of fact, of his own rights. It is shown, however, that he was entitled to one-half of the estate, and the question is, have his rights been impaired by the sale under the judgment in favor of Cox. The jury, and the court below, were of opinion that they were unimpaired, and the plaintiff had judgment for one undivided half of the property, together with a large amount for rents and profits, without any allowance for what was due to Cox by Brown at his death; and the defendant and warrantor appealed, after an unsuccessful motion for a new trial. The evidence shows that Cox recovered a judgment against E. C. Davis, who held herself out as the sole heir of Brown, for a considerable sum. How much was due by Brown at his death in

1821, does not distinctly appear. Cox agreed to receive payment in five annual instalments, with interest at eight per cent; but a *fiери facias* was issued for the whole amount, the land and slaves were sold, and the husband became the purchaser and assumed to pay the amount of the judgment to Cox, on the terms of credit above mentioned. We have no hesitation in saying that, if, by legal proceedings fairly conducted for a debt due by the deceased common ancestor of the parties, the property had been sold at a judicial sale, the purchaser would have acquired a good title against an heir who should make himself known afterwards. 8 La. 321. But, in the case now before us, there was not a sale in the regular course of judicial proceedings; the sale was not made to enforce the payment of the debt due to Cox, but probably to change the title from the wife to the husband, who, thereupon, assumed to pay Cox's judgment. Nor is it shown what part of Cox's claim was due by John Brown himself, or for charges in relation to his succession; nor what part was contracted by the heirs at law in actual possession of the estate. One-half of the debts and charges of Brown's estate are justly due by the plaintiff, and he is in our opinion bound to reimburse them as a condition of his recovery. The payment was for his benefit, and is justly due to the estate of G. B. Davis if paid by him, or to Cox's estate if still due, or to whomsoever is legally subrogated to his rights and actions. But the amount is not ascertained; and for this purpose, and to determine upon the questions of warranty, the case must be remanded.

There are numerous bills of exception in the record, most of which do not seem to require any particular notice. We think ourselves, however, called upon to pronounce upon the question, whether E. C. Davis can be called in as a warrantor, and whether she be a competent witness.

If she be a warrantor, her obligations, as such, must be towards the estate of her own husband, for engagements contracted by her during the marriage in relation to the alienation of the property in controversy. We know of no case in which a wife can sell to her husband, and bind herself towards him under the obligations of a vendor. He may, in some cases, validly sell to her, but she is in no case authorized to sell to him. It follows that

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the representatives of the husband cannot call on her as a warrantor, and that being without interest in that respect she may be a competent witness in this case.

Upon the whole, we are of opinion that the plaintiff is entitled to recover one undivided half of the property in possession of the defendant, which belonged to the estate of John Brown, subject to the payment of one-half of what was justly due by the estate to N. Cox, together with one-half of the rents and profits since the institution of this suit; and that the estate of Davis is liable over as warrantor to the defendant, for the loss to be sustained by him by this eviction. But as the verdict and judgment are not supported by the law and evidence, the cause must be remanded for a new trial and for further proceedings.

The judgment of the District Court is, therefore, reversed, the verdict set aside, and the case remanded for a new trial and further proceedings according to law. The plaintiff to pay the costs of the appeal.

Dunn and Andrews, for the plaintiff.

Lobdell, for the appellant.

GREGORY BYRNE v. ISAAC HOOPER and others.

Each of the joint owners of a steamer, or other vessel, holds an undivided share, which he may dispose of without consulting the others; but neither can sell the interest of a co-proprietor without his consent.

Where the joint owners of a steamer employ her in carrying merchandize for freight, they become, *quoad hoc*, commercial partners, and are liable, *in solido*, to third persons, for all debts incurred in prosecuting the business; but the boat does not thereby cease to be the property of the joint owners, and become partnership property. The manner of employing the boat does not change the title by which it is held. It will continue to be the individual property of each of the owners.

Where a judgment has been obtained against the joint owners of a steamer, a waiver by one of the formalities required by law for the sale of the property, will not be binding on the rest.

The members of a commercial partnership have each the right to represent the firm. Service of citation on either, or admissions by either, will be binding on the rest. But where it is attempted to satisfy a judgment against the partnership out of the individual property of a member, he alone can waive the formalities required by law for its alienation. In such a case, a partner has no more authority than a stranger.

Byrne v. Hooper and others.

Joseph Kinney is appellant from a judgment of the District Court of the First District, *Buchanan, J.*

MORPHY, J. On the 21st of October, 1841, a number of persons having brought suit against the steamer Robert Fulton and owners, for wages, provisions furnished and repairs, amounting to between five and six thousand dollars, Isaac Hooper, the master, and one of the owners of the boat, confessed judgments in the several suits on the same day, and writs of *fiery facias* were issued immediately on each of them. On the next day, Hooper entered into a written consent that the boat should be sold, after twelve days' advertisement, for cash. From the return of the sheriff, it appears that he seized the Robert Fulton under the several writs placed in his hands, and, under the agreement, advertised her for sale, and adjudicated her, for the sum of \$5000, to Joseph Kinney, who neglected to comply with the terms of the sale, and only paid \$1600 on account thereof; that on the 28th of November, 1841, he addressed a written notice to Kinney, informing him that unless he complied with the terms of the sale, the vessel would be again advertised, and sold at his risk and expense; that the vessel was accordingly a second time advertised during twelve days, and sold to F. M. Fisk for \$3300. The plaintiff's counsel then moved for a rule on the sheriff to bring into court for distribution the proceeds of the steamer, and particularly the sum of \$1600 received from Kinney, whom he made a party to the rule. The latter, in answer to this motion, states in substance, that the \$1600 paid by him should not be considered as liable to the judgments obtained against the boat, because he had been notified by Tucker and Hillyer, owners of two-thirds of the Robert Fulton, that the sale was illegal, and had been forbidden to pay any more on account of his bid; that in consequence of such notification and prohibition, he refused to make any further payment, upon which the sheriff again proceeded to sell the vessel, in an illegal manner, without proper notice and advertisement; that, at this second sale, F. M. Fisk became the purchaser, and has the boat now in his possession; but that in consequence of the illegalities in the two sales, Fisk has acquired no legal title. Kinney further avers that the consent under which the steamer was sold, was given by Captain Hooper alone, who was only a part

owner, and had no authority from his co-proprietors to give any such consent; that the sale was made at a time, and in a manner calculated to cause her to sell for less than her real value; and that he believes that the consent to sell was made for the purpose of defeating a privileged claim of \$12,000, due to him and his partner, as vendors of the boat to Tucker, Hillyer & Hooper. He pleads, moreover, the existence of a suit brought against Fisk by Tucker & Hillyer, and to which he has been made a party, the object of which suit is to rescind the sale of the Robert Fulton. By consent of parties this suit has been cumulated with the rule taken by plaintiff, and tried with it. The petition of Tucker & Hillyer alleges that they, and Isaac Hooper, were joint owners, each of one-third, of the steamer Robert Fulton, by purchase from J. & W. Kinney, but that F. M. Fisk pretends to have a title to said steamer by virtue of a sale under execution in divers suits to which they were not parties; that Isaac Hooper, the captain of the steamer, did, wrongfully, and without authority from them, confess judgments in favor of Gregory Byrne for an amount not due by the Robert Fulton or her owners, and likewise did consent that the steamer should be sold under execution after twelve days' advertisement; that the said steamer was knocked down to G. Byrne for \$8500, but that the sheriff again put up the boat for sale forthwith, when she was then sold to J. Kinney for \$5000; that the said Kinney paid the sheriff \$1600 on account of the purchase, but that, neglecting to pay the balance, the boat was again advertised for sale within the period required by law, and was sold to F. M. Fisk for \$3300, in all which there was error, the forms of law in giving notice, and in advertising the steamboat, not having been complied with, and the sheriff having treated the bid of Gregory Byrne as a nullity; whereas, if the petitioners are bound by the sale, they allege that they have the right to insist upon the sale being made, and the sheriff, J. L. Thielen, being held responsible for the sum of \$8500, as the price thereof.

The petitioners further allege that the sum of \$1600 paid by Kinney, and the amount paid by F. M. Fisk, appear, by the sheriff's returns, to be in his hands, and that they fear, unless notice be given to the parties, the above amounts will be paid over to

persons having judgments against the Robert Fulton, to their prejudice. The petition concludes with a prayer that Fisk, Thielen, Hooper, and G. Byrne be cited ; that the petitioners be declared owners of two undivided thirds of said steamer ; that J. Kinney be notified not to pay to the sheriff any thing on account of his bid ; that Byrne, Hooper and Thielen be condemned to pay the petitioners \$5000 for their unlawful acts in the premises, reserving petitioners' right of action against Byrne and Thielen for two-thirds of \$8500, in case it be decreed that the petitioners were bound by Hooper's acts ; and, lastly, in case Fisk should not forthwith deliver up to the petitioners the steamer, that they may have judgment against him, each of them for the sum of \$3000, one-third of her value, and for \$300 each, per month, from the date of filing the petition until his delivery of the steamer.

A few days after this action was brought, one of the part owners, Hillyer, whose name figures as one of the plaintiffs, entered a formal disclaimer, declaring that he had never questioned the legality of Hooper's acts and confessions of judgments in the suits brought against the boat, or in the consent given for the sale ; but that, on the contrary, he approved of all those acts, and had never authorized any suit to be brought in his name to have such sale annulled.

F. M. Fisk pleaded the general issue, averring that he has expended in good faith, and for necessary repairs, in order to enable the boat to navigate the river, \$1500, for which sum he prays judgment, should the court be of opinion that his title to the boat is not good. On these pleadings, the parties went to trial below ; whereupon, the court rendered the rule taken in this suit absolute, and gave judgment in favor of the defendants in their suit against Fisk and others.

The only question in this case is, whether Hooper, the captain, and part owner of the Robert Fulton, had authority to give the consent, under which the boat was sold after twelve days' advertisement, instead of the thirty days required by art. 670 of the Code of Practice. This authority is claimed and sought to be justified on the broad ground, that he had the right to sell the entirety of the boat, without the consent of his co-proprietors. The argument is, that by article 2796 of the Civil Code, the own-

ers of a vessel, if they employ her in carrying passengers or personal property for hire, are to be considered as commercial partners; that it is well settled that one commercial partner has the absolute *jus disponendi* of the personal effects or property of the partnership; and that, therefore, Hooper could have sold the boat; that if he had this right, he surely had that of making a contract or agreement as to the manner in, and the time at which the boat should be advertised and sold, when under seizure for debts due by the partnership. This reasoning would be unanswerable, if the fact which it assumes were true, to wit, that the Robert Fulton was partnership property. There existed no partnership between Tucker, Hillyer and Hooper, at the time when they purchased the boat, nor is there any evidence that they put the property of the boat into the partnership when they agreed to run her on their joint account. By the act of sale, they were joint and equal purchasers; each became the owner of one undivided third of the boat; each might have disposed of his own share without consulting the others, but no one of them had the right to sell the separate interest of his co-proprietors without their consent. Such is the well settled law applicable to part owners of vessels. Abbott on Shipping, 68, *et seq.* Story on Partnership, 585. 3 Kent, 154. By running the boat for freight and hire, have these persons ceased to be part owners, or, in other words, has the boat become the property of a commercial firm? By art. 2796 of the Civil Code it is provided, that an association for the purpose of carrying personal property for hire in ships and other vessels, is a commercial partnership. Hence we have held, that where two or more owners of a boat employ her in carrying goods on freight, they become commercial partners *quoad hoc*, and, as such, are liable *in solido* to third persons for all debts incurred in the prosecution of the business of the firm. This co-partnership is implied by law, not from the joint purchase or ownership of a boat, but from the act and undertaking of carrying personal property for hire. We do not believe that the use the owners made of this boat changed the title they had to it previously. It continued to be the individual property of each of the partners, although it was made the means or instrument by which they carried on their trade; and neither of them had the right to sell the

entire vessel without the consent of the others. But it is urged that the consent of Hooper to waive a part of the time during which the law required the property to be advertised, should only be considered as an incidental step taken in a judicial proceeding, the whole control and management of which was in his hands; that if he had the legal right to defend the suit, and even to confess judgment, without the consent of his co-partners, he had the right to enter into an agreement as to the manner in which the property should be advertised. This appears to us a *non sequitur*. The members of a commercial firm have each the right to represent the firm, and the service of a citation on one partner is binding on all; nor has it been questioned, to our knowledge, that in a commercial co-partnership admissions by one partner are binding on the others; but where a judgment against the partnership is sought to be satisfied out of the individual property of a partner, he alone can waive the formality required by law for its alienation. A partner, in such a case, has no more authority than an absolute stranger. We regret that we are constrained to come to the conclusion that the sheriff's sales to Kinney and Fisk were illegal and void, for want of the advertisement required by law. From the number and amount of the debts admitted, or proved to be due by the boat, it is improbable that Tucker will derive any advantage from his success in this suit, while it is certain that great delay and expense will be the consequence of a re-sale; but with these considerations we have, perhaps, nothing to do, when parties, misapprehending their true interests, call upon us to decide strictly on their legal rights.

As to the sum of \$1600 paid by Kinney to the sheriff, it must be returned to him. He could not be compelled to take a part interest, when he had bid for the whole vessel. The sale to him being null, the consideration for which this money was paid has entirely failed.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed; that the adjudication of the steamer Robert Fulton to F. M. Fisk be set aside, and declared null and void; that the boat be returned to the hands of the sheriff who had her under seizure, on his returning to the purchaser the sum of \$3300 by him paid, reserving to the latter his

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claim, if any he has, for repairs made to the boat. And it is further ordered, that the sheriff do reimburse and pay over to J. Kinney the sum of sixteen hundred dollars, paid by him on account of his bid at the first exposure of the property for sale. The costs to be paid by the appellees in both courts.

Elmore and *W. W. King*, for the appellant, *Larue* for the plaintiff, and *Elwyn*, *Peyton*, *I. W. Smith*, and *Roselius*, for different appellees.

MEINRAD GREINER v. J. C. PRENDERGAST.

The surety in an injunction bond may be surety for his principal, on an appeal by the latter from a judgment dissolving the injunction, and condemning principal and surety, *in solido*, to the payment of damages and costs.

No appellant but the State, is exempt from the law requiring surety on granting an appeal, whether devolutive or suspensive.

THE plaintiff commenced an action before the District Court of the First District, to annul a judgment which had been obtained against him by the defendant, for \$271 50 with interest, and \$38 34 costs, claiming one thousand dollars as damages. A supplemental petition was filed, in which it was alleged that the defendant had, since the filing of the original petition, taken out an execution on the judgment obtained by him, and was proceeding to enforce the same. An injunction was accordingly prayed for, and granted on the execution of a bond, with Benjamin Levy as security, for the payment of all such damages as might be awarded to the plaintiff, in case it should be decided that the injunction was wrongfully obtained. On a rule against the plaintiff to show cause why the injunction should not be dissolved, and himself and his security condemned to pay the debt with interest and damages, the injunction was dissolved, and the plaintiff and Levy, his security, were condemned to pay *in solido* twenty-seven dollars as damages, with interest at ten per cent on the amount of the judgment, and the costs. From this judgment the plaintiff prayed for a suspensive appeal, which was allowed on his executing a bond

with Levy as security, and the record was filed in the Supreme Court.

Greiner subsequently presented a petition to the latter tribunal, in which he alleged that the judge of the District Court had ordered the appeal to be set aside; and on his motion, a rule was taken on the judge, to show cause why a writ of prohibition should not be issued, "commanding him to rescind the order setting aside the appeal, and to suspend the execution of the judgment dissolving the injunction, and to grant a suspensive appeal according to law." *Buchanan*, Judge of the District Court of the First District, in answer to the rule, showed, that the appeal had been taken from a judgment of his court dissolving an injunction sued out by Greiner, and condemning the latter, and Levy, his surety, *in solido*, to the payment of damages, &c., as above mentioned, from which Greiner alone had appealed, giving Levy as his surety on the appeal bond. That it had been contended, on a rule to rescind the order allowing the appeal, that the bond, with Levy as surety, did not give such additional security to the plaintiff as is required by art. 575 of the Code of Practice. That if Greiner could give Levy as his surety, Levy might, in case he should appeal, give Greiner; and that by this means both parties might appeal, without furnishing to the plaintiff any additional security. As to the right of the District Court to take cognizance of the question relative to the security on the appeal, the judge cited the case of *The State v. Buchanan*, 13 La. 574.

MARTIN, J. The defendant read his affidavit showing that he had obtained an injunction to stay the execution of a writ of *fiery facias* which had been issued against him; that the injunction had been dissolved; that he had prayed for and obtained an appeal from the judgment dissolving the injunction, and had in due time filed the transcript of the record in this court; and that, afterwards, the judge *a quo* set aside the said appeal.

On this he moved for a writ of prohibition inhibiting the judge from issuing any execution on the said judgment, and commanding him to rescind the order suspending the appeal, and to grant a suspensive one according to law.

To a rule to show cause the judge of the First District answered, that the defendant had alone appealed from the judgment

of dissolution by which damages were given against him and his surety in the injunction bond, and that he had given the latter as his surety for the appeal. The solvency of the co-obligor of the defendant, as surety for the injunction and for the appeal, was not questioned; but it was urged that if the defendant could obtain an appeal on giving his co-obligor in the injunction bond as his surety in the appeal bond, that his co-obligor, if he chose to appeal, might give the defendant as his surety; so that both might appeal without giving to the plaintiff any greater security than he had before the appeal was asked, which would be contrary to the provision of the Code of Practice, art. 575.

The judge in our opinion erred. The defendant had a right to a suspensive appeal, provided he offered such surety as would indemnify his adversary against all the consequences which might result from the appeal, as in the case of an increase of the sum recovered, if the appellee should obtain such an increase in this court. It is true that if both the principal and surety, against whom damages had been given on the dissolution of an injunction, had joined in an appeal, they would have been bound to give one solvent surety, although they were both admitted to be sufficiently solvent to remove all idea of danger on that score; the reason would be that the law expressly requires surety on the grant of any appeal, devolutive or suspensive. From giving the surety, no appellant, but the State, can be dispensed, though he should show that he possessed in the parish land and slaves, bound by the judgment, of a hundred fold its amount. The transcript being already in this court, we see no reason to take notice of any part of the defendant's application, except that which relates to the prohibition of all proceedings in the District Court on his judgment. Let such a writ of prohibition be issued.

A prohibition was accordingly issued ordering the judge to abstain from all further proceedings in the case, to rescind the order setting aside the appeal, to suspend the execution of the judgment dissolving the injunction, and to grant a suspensive appeal.

Greiner subsequently presented a second petition to the Supreme Court, in which, after reciting his former application and the order

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granting the prohibition, he alleged that, previously thereto, an execution had been issued against Levy and Cook, as garnishees under a *fi. fa.* obtained against him in the case of Prendergast against Greiner; that the injunction which he had obtained in the court below, which was afterwards dissolved by that court, and from which judgment of dissolution he had, by means of the prohibition previously granted him, obtained the suspensive appeal now pending, had been granted for the purpose of enjoining all further proceedings under the seizure of the petitioner's property in the hands of the garnishees; that, notwithstanding the premises, the judge of the District Court had, in violation of the writ of prohibition directed to him, refused to order the sheriff of his court to suspend his proceedings under the execution against the garnishees; and that the sheriff was about proceeding to execute the same. He prayed that an order might be directed to the judge below, to show cause why he should not direct the sheriff of his court to suspend the execution of the *fi. fa.* against Levy and Cook, and why a direct order should not be issued to the sheriff himself to take no further action in the premises. A second writ of prohibition was ordered to be issued, directed to the sheriff of the court below, in conformity with the prayer of the petition.

M. M. Robinson, for the defendant Prendergast, moved for a rule on the appellant to show cause why the writs of prohibition issued in this case, should not be set aside, on the grounds: 1. That they were issued *ex parte*, and without notice of the application having been given to the party principally interested in the judgment and execution, in regard to which all proceedings had been prohibited.* 2. That the court had no jurisdiction of the case, the action having been instituted for a sum under \$300.

Motion overruled.

* This case led to the adoption of the rule declaring that the court would thereafter "listen to no motion for a prohibition, without previous reasonable notice of such motion to the opposite party, or his counsel." See Rule at the commencement of this volume.

JOSEPH MARIE FERNANDEZ v. JOHN McVITTIE.

Plaintiff having obtained a writ of provisional seizure caused it to be levied on a debt due to defendant by a third person, which the sheriff, without any order of court, released, on the execution of a bond by the defendant, with security, for the restoration of the property, and satisfaction of any judgment which the plaintiff might obtain. The bond was assigned to the plaintiff, but no evidence offered to prove that he accepted the assignment. *Held*, that the release was illegal, and the sheriff responsible to the plaintiff for the amount of the seizure.

APPEAL from the District Court of the First District, *Buchanan, J.* This case was submitted without argument, by *Duvigneaud*, for the plaintiff. No counsel appeared for the appellant.

MARTIN, J. Judgment having been rendered against the defendant, the plaintiff obtained against Hozey, the sheriff of the parish, a rule to show cause why he should not pay to the plaintiff the sum of \$528 91, which was provisionally seized in the hands of Samory, and released by the sheriff contrary to law; and the latter is appellant from a judgment making the rule absolute. The facts of the case are these: Samory had employed the defendant as undertaker of a building to be erected for him, and the plaintiff was engaged as a laborer by the defendant in the erection of the building, and obtained a writ of provisional seizure for a sum due by Samory to the defendant, according to their contract, equal to one due by the defendant to the plaintiff for his services as a workman. Civil Code, art. 2744. The sheriff's answer to the rule avers, that he took a legal bond from the defendant, which he assigned to the plaintiff, who made no objection thereto. His return shows that under the writ of provisional seizure, he seized in the hands of Samory \$528 91, which was afterwards released on the defendant's giving bond with security.* Defendant has not been able to show, and we are not acquainted with any law under which the sheriff's release can be justified. There is no evidence

* The bond was payable to the sheriff, and assigned by the latter to the plaintiff. The condition was, "that the defendant shall not send the property out of the jurisdiction of the court, and that he will faithfully present the same, in case he should be decreed to restore the same to the sheriff or plaintiff, and shall satisfy such judgment as may be rendered in the suit pending," &c.

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of the assignment of the bond having been accepted by the plaintiff.

Judgment affirmed.

JEAN FLEMING v. JEAN BAPTISTE VOLANT LABARRE.

APPEAL from the District Court of the First District, *Buchanan, J.* This case was submitted, without argument, by *Peyton* and *I. W. Smith*, for the plaintiff. No counsel appeared for the appellant.

BULLARD, J. This is an action by a carpenter to recover the value of certain extra work, done by him in building a house for the defendant. There was a special contract for building the house, but very loosely drawn up, and, as frequently happens in such cases, the extra work is nearly equal to the price stipulated for the job. The claim was considerably reduced by the District Court, but the defendant was dissatisfied, and has appealed.

Some of the work is manifestly not provided for by the contract, and the evidence, as to the whole matter, is variant, if not contradictory. We are not satisfied that the conclusion of the judge is so manifestly erroneous as to require our interference.

But it is contended, by the appellant's counsel, that a new trial ought to have been granted, on the ground that the admission in the record had been incorrectly taken down by the clerk, a fact which came to his knowledge after the trial. It appears to us that if the admission were entirely disregarded, the result would not be varied.

Judgment affirmed.

EDWARD SALZMAN v. HIS CREDITORS.

Where property, subject to a special mortgage, does not sell for enough to satisfy the mortgage, the mortgagee becomes an ordinary creditor for the difference ; and if there be nothing for such creditors, he must lose the surplus.

The owners of notes executed each for a portion of the price of property, and secured by the same mortgage, are entitled to be paid out of the proceeds of the property, in proportion to the amount of the notes owned by them respectively.

Where the holder of a claim secured by mortgage, assigns a part of it, he cannot come in competition with his assignee, if the property prove insufficient to pay both. Though he warrant only the existence of the debt at the time of the transfer, it would be contrary to good faith, to permit him, after receiving the price from his assignee, to prevent the latter from recovering the amount paid by him.

THE syndic of the creditors of Salzman, and S. T. Hobson & Co. are appellants from a judgment of the District Court of the First District, *Buchanan, J.*, on certain oppositions to a provisional tableau of distribution filed by the former.

MORPHY, J. This case comes before us on several oppositions to a tableau of distribution filed by the syndic. We shall examine them, in the order in which they have been passed upon by the judgment appealed from.

I. The claim of Louisa Ann Salzman, the insolvent's wife, for \$2100, which she alleges was received by her husband, appears to us unsupported by sufficient evidence. It was attempted to be proved by her sister, who, it is evident, knew nothing of her own personal knowledge. She gives as the reason of her belief that Louisa A. Salzman had at the time of her marriage, and placed in the hands of the insolvent from \$1900 to \$2000, that for several years preceding, her expenses did not equal her receipts from her profession as an actress, that she had saved that amount from her earnings, and that when she left New Orleans, in May, 1839, to join her mother in England, she had not the means of defraying her expenses home. It is shown, moreover, that the witness arrived in this country more than six months after the marriage of her sister.

II. The next opposition is that of Lucy Ann Caldwell. She alleges that she has a special mortgage and vendor's privilege on two lots of ground surrendered by the insolvent, which were sold for \$2700 cash, a sum insufficient to satisfy her claim ; that, con-

sequently, the whole proceeds of the sale belong to her, but that by the tableau she is made to contribute, as a second mortgage and judgment creditor, a sum of \$364 59, to pay a balance of \$10,747 59 due to other mortgage claims; and that according to the tableau, this contribution, if due at all, is due only by second mortgage and judgment creditors, while she has a first mortgage and a vendor's privilege.

Had a general opposition been made to this tableau, we should have had no hesitation in rejecting and setting it aside *in toto*, as unintelligible and made in violation of every principle of law; but, inasmuch as it has been homologated such as it is, and so far as not opposed, we must confine our examination of it to the particular oppositions before us. The contribution, which is resisted by L. A. Caldwell, appears to be charged, if we are to judge from the words of the tableau, to pay certain deficiencies on special mortgages amounting to \$11,870 72. It seems that at the syndic's sale, most of the creditors having mortgages, bought the property subject to their mortgages for less than the amounts due to them. The syndic appears to have thrown together the deficiencies on the special mortgages of the creditors who had not become purchasers of the mortgaged property, and has made L. A. Caldwell, and the other purchasers debtors for a proportion of such deficiencies according to their purchases. If such be the meaning of the tableau, nothing can be imagined more illegal or unreasonable. It is clear that if property specially mortgaged be sold for an amount insufficient to pay the mortgage, the holder of such mortgage becomes an ordinary creditor for the difference, and that if there be nothing coming to the ordinary creditor, he must lose the surplus of his claim. The counsel for the syndic has admitted the tableau to be a most awkward one, and has offered an explanation of it, which does not render it much more intelligible. Such as it is, Lucy Ann Caldwell is called upon to pay a contribution, as a second mortgage and judgment creditor. Her claim does not fall within the class which, according to the syndic's showing, ought to support the contribution. Having a vendor's privilege on the lots bought by her, she had a right to be paid first out of their proceeds, and was surely liable to no contribution for the payment of persons having special mortgages on other property.

III. The remaining opposition is that of Jacob Barker. He is the holder of two notes, given by the insolvent to Hagan, Niven & Co., for the two first instalments of a house and lot sold to the insolvent by the latter for the price of \$7322 23, and secured, by special mortgage on the property sold. He alleges that he purchased the property at the syndic's sale for a sum less than the amount of his mortgage, after deducting a prior mortgage of \$2045, and that he is entitled to the balance of the price in preference to S. T. Hobson & Co., who are the holders of the third note given for the same property, because this note has not been legally and absolutely transferred to them; and, moreover, because the debt has been seized in execution at his suit. This opponent urges the same objections as L. A. Caldwell, against the contribution demanded of him to pay deficiencies upon other mortgages.

If the third note held by Hobson & Co. belonged to them, they would undoubtedly be entitled to the proportion allowed them by the tableau of the proceeds of the property sold, the three notes being portions of the same price, and being secured by the same mortgage. 2 La. 455. But the evidence shows that it is yet the property of Hagan, Niven & Co., by whom it was, with other notes, handed over to Hobson & Co., in order that they might receive the proceeds, and apply them to a judgment which they hold against Hagan, Niven & Co., for about \$7000. Hobson & Co. being aware that this arrangement did not amount to a pledge under our laws, and gave them no rights with regard to third persons, had this note seized in their own hands under the two judgments they held against Hagan, Niven & Co. Giving every possible effect to this seizure, it is clear that it could vest in Hobson & Co. no greater rights than those which Hagan, Niven & Co. had themselves in the note. As vendors of the property, they were originally holders of the three notes of the insolvent, secured by mortgage. They endorsed and negotiated the two first notes, now held by Barker, and retained the one which they afterwards placed as collateral security in the hands of Hobson & Co. When the holder of a claim, secured by mortgage, assigns a part of it, he cannot be permitted to come in competition with his assignee, if the pledge is insufficient to pay both; although he warrants only the existence of the debt at the time of the transfer, yet

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it would be contrary to good faith, that the vendor of a claim, after receiving the price of it from the assignee, should, by his own act, prevent the latter from recovering the sum he has paid. *Troplong, Des Privilèges, et Hypothèques, v. 1, No. 367. Grenier, v. 1, No. 93.* The present case is much stronger than that of an ordinary transfer of a debt, because Hagan, Niven & Co., by endorsing the two notes, have guarantied the claim assigned, and become liable *in solido* for its payment to Barker.

It is therefore ordered that the judgment of the District Court be affirmed with costs, as relates to the oppositions of Lucy Ann Caldwell and Barker, and reversed as relates to that of Louisa Ann Salzman, which is hereby dismissed, the cost of this last opposition to be borne by her in both courts.

Micou and Benjamin, for the appellants.

S. L. Johnson, and Barker, for the appellees.

THE FIRST MUNICIPALITY OF THE CITY OF NEW ORLEANS v.
JOHN McDONOUGH.

Under the act of 8th March, 1836, dividing the city of New Orleans into three municipal corporations, each of the Municipalities is authorized to acquire, enjoy, alienate, mortgage, or otherwise dispose of all kinds of property, real, personal, or mixed; and such purchase may be for cash, or for a price payable at a future period.

A purchase of real estate by one of the Municipalities of the city of New Orleans, with a view to divide it into lots and streets and to re-sell the same, for the purpose of improving the cleanliness and salubrity of the city, and the convenience of the streets, is legal. Act 14 March, 1816.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. The petition sets forth that, in the month of February, 1837, the members composing the Council of the First Municipality, held a secret session, in which they adopted a resolution directing the Mayor and Committee of Improvement to purchase from the defendant, a large portion of the square of ground situated between Condé, Hospital, Barrack and Levee streets, for

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a sum not exceeding \$290,000, payable in the bonds of the Municipality, twenty-five years after date, bearing interest at the rate of six per cent per annum, payable semi-annually; but, if the purchase could not be effected on those terms, to conclude it by making the price payable in five annual instalments, with six per cent interest from date. This resolution was not approved by the Mayor, and the legal majority could not be found to pass it. At the meeting at which it was rejected, a resolution, similar in all respects, except as to the latter clause, was passed by the Council. This was also rejected by the Mayor, but upon a reconsideration after the veto, the resolution was passed by a legal majority of the Council.

In obedience to this last resolution, an authentic act was passed, on the 7th of April, 1837, by which the defendant sold the lot of ground in question to the plaintiffs for \$247,000, payable in their bonds twenty-five years after date, with six per cent per annum interest, payable semi-annually.

The plaintiffs now pray that this contract may be annulled, that the bonds may be given up to be cancelled, the defendant condemned to repay \$31,870 wrongfully paid for interest, and that the certificates for the interest may be also surrendered and cancelled, because, in the purchase of the property, and in issuing the bonds in question, the members of the Council acted contrary to law, and transcended the powers and authority delegated by the acts of incorporation. The petitioners allege, *first*, that when the Mayor had returned the first resolution with his veto, and the Council did not persist in it, they had no right, at the same sitting or meeting, to introduce or pass a similar resolution; *secondly*, that the purchase of the property was made with a view to a resale for profit, and for speculation, and not for the attainment of any of the objects in relation to which the Council was authorized to act; *thirdly*, that the Council had no power or authority to acquire the property; wherefore, the execution and delivery of the bonds and interest certificates are void and of no validity, and the deed of sale also null and void. The prayer of the petition is analogous to these various allegations, and the defendant has been enjoined from disposing of the bonds and certificates in any man-

ner, so as to put them beyond the reach of the process of the court.

For answer, the defendant admits the sale of the property for the consideration mentioned. He avers that it was made in good faith, at the instance and request of the corporation, for their sole and exclusive use ; that the property has long since been delivered to the Municipality, and remains in their possession, except such portions as have been sold to other persons ; that the plaintiffs have entirely changed the nature of the property, by pulling down and removing extensive and valuable buildings, by dividing the ground into small lots and selling them to various individuals, and by opening a street or streets through the same for public use and convenience. He states that the sale is legal and binding in all respects, and should not be rescinded for any of the causes stated ; but if it should be annulled, he prays that the Municipality may be condemned to restore the property in the state in which it was when sold, and to pay all just and reasonable damages for the changes that have been made, and for all other injuries done to the same.

The resolutions of the Council, and the vetoes of the Mayor, are in the record, as well as the sale from the defendant duly accepted. Two hundred and forty-seven bonds, of \$1000 each, were issued, and fifty interest certificates for each bond. The resolution shows that the Council were willing to give \$290,000 for the property ; but the consideration was \$247,000, payable as stated. The Mayor, in his veto, informs the Council that the property was not worth more than half the sum proposed to be given for it ; but their resolution was persisted in, and adopted with only two dissenting votes.

Gallien Preval, who was a member of the Council, and took an active part, as it appears, in this transaction, testifies that the object in purchasing the property was to re-sell it, and that it was so understood by the Council, the public, and the people generally ; that he does not know that such purpose was known to the defendant, as nothing was ever said about it. A plan of the property was made after the purchase, and a street marked through the centre, and the lots sold, in conformity to the plan, to different

persons. He says that the Council was well aware, when the purchase was made, that money would be lost by it; but that the object in purchasing was to improve that part of the city. It was the opinion of the members of the Council, at the time, that as long as the property remained in the hands of the defendant, it would not be improved; and it was considered a nuisance so long as it remained so. It was a detriment to other property in the neighborhood, a receptacle for dirt and filth, and considered injurious to the health of that part of the city. He says the Municipality took possession, tore down every thing that was on the ground, and caused to be sold at auction the immense brick building, formerly used as barracks by the United States. It was demolished, and the material in the foundation taken away by the municipal authorities, and used in repairing the streets.

In February, 1839, and in June, 1840, a number of the lots were sold at auction, by order of the Council, for upwards of \$70,000. That body, afterwards, not finding them so valuable and useful as their predecessors had supposed they would be, got all the sales annulled, released the purchasers, and in the month of October, in the latter year, commenced this suit. When the resolutions, directing the sale of the lots, were passed, they contained a condition that the lots sold should be improved, and houses built upon a plan annexed, and they were so sold; and the evidence of the plaintiffs shows, that if they had been so built on and improved, it would have been a great advantage to the surrounding property, and a great improvement to that quarter of the city.

Prieur, the Mayor of the city, says, that he did not consider this ground more a nuisance than other open lots around it. He stated fully to the Council, his views as to the inexpediency of the purchase, yet they persisted. He says that the opening of the street was a public convenience; not a very great one, but calculated to give additional value to the lots offered for sale.

The District Court gave a judgment for the plaintiffs, annulling the sale, decreeing a restoration of the bonds and interest certificates, and condemning the defendant to pay \$51,870, which he had received for interest on the bonds, from which he has appealed. The first ground upon which it is alleged that the resolu-

tion is null, depends entirely upon the rules adopted by the Council for its government. They are not in evidence; but if they were, they would not affect the case, as it appears that all rules were dispensed with when the resolution was adopted.

In the case of *The First Municipality of New Orleans v. The Orleans Theatre Company*, ante, 209, which is nearly similar to the present case, we very recently examined into the power and authority of the Council to purchase and sell real estate, by any description of title whatever. The language of the act of 1836, dividing the city into municipalities, is as express and general as can well be used. B. & C. Dig. 123, sec. 6. The Civil Code, art. 424, says, that all such corporations may hold real estate, and enjoy the same. Besides all the specific powers, there is a sweeping clause in the act of 1836, which says, that the Municipalities shall, each within its limits, possess and exercise all the powers, rights and privileges, which were at the time possessed and exercised by the corporation of New Orleans. It is well known, that that body acquired and sold large quantities of real estate. The Congress of the United States treated it as a corporation, capable of receiving and alienating landed property. 1 Land Laws, 549, 581, 598, 803, 835. And it is known that portions of the land, not necessary for municipal purposes, have been sold by that corporation and its successors, the present Municipalities. The titles of many lots in the city can easily be traced to the corporation, and there is no doubt many more will be sold by it as its want of pecuniary means shall make it necessary to sell. If this court were to exercise a controlling power over the faculty of the corporation to acquire real property, it might, with equal propriety, control its discretion to alienate; and thus a field for litigation would be opened, which we do not believe the legislature ever contemplated.

In this case the evidence shows, that the intention of the corporation was not to make money by speculating in real estate. It is true the intention to re-sell the property was known and avowed, but not for the purpose of making money; but to abate what the Council considered a nuisance, to improve that part of the city, destroy a receptacle for filth, preserve the health of the citizens, and open a street for public convenience, all legitimate objects on

the part of the Council. It is not for us to enter into the motives of the Council, and say that they were improper or impure, without any allegation or proof to that effect, however impolitic or inexpedient we may individually think the scheme.

If a want of authority to purchase the property in question existed, it is a little remarkable that it should not have been suggested by the Mayor, in either of his veto messages. He did all that he could, to convince the Council of the inexpediency of the purchase, but never suggested a doubt as to the power. He speaks of the value of the property; says too much is proposed to be given for it; that a loss of at least \$140,000 will be the result of it; tells them that the means of the Municipality are not adequate to such an operation; and, being doubtless informed of the purposes which the Council had in view, says, that to fulfil the objects proposed, if he thought a loss of only \$15,000 or \$20,000 would result to the Municipality, he would not make an objection, as the deficit would be made up in the augmentation in value resulting to that quarter by the contemplated improvements, but that \$140,000 is too much to give for such objects. It is thus seen that, if we depart a single step from the question whether the corporation has a right to buy and sell real estate, a proposition arises that we cannot grasp judicially, without undertaking to exercise a supervising control over all the proceedings of the Municipality, on questions of expediency.

We then come back to the question, has the Municipality power to purchase real estate? The legislature, in 1836, say, in broad terms, that it may acquire, by onerous or gratuitous title, all kinds of property, real, personal or mixed, and may enjoy, alienate, mortgage, or otherwise dispose of the same. What restriction or limitation is there on the Council? The counsel for the plaintiffs insist that the members can only exercise their functions according to art. 430 of the Code, which says that they shall not exceed the limits of the administration entrusted to them. This is very true, but the same article declares that the attorneys and officers of corporations have their duties pointed out by their nomination, and exercise them according to the general regulations and particular statutes of the corporation of which they are the heads; and, if the powers are not expressly determined, that they are re-

gulated in the same manner as other agents. The counsel for the defendant, with the mandate in his hand, alleges that the members of the Council of the Municipality can buy and sell real estate. True, say the counsel for the plaintiffs, but in this instance they have exceeded the limits of the administration entrusted to them. The response is ready, that they have not done so, as the object of the purchase was "to maintain the cleanliness and salubrity of the city, and to secure the safety and convenience of passing the streets and squares," purposes which are specially confided to them by the act of 1816. B. & C. Dig. 101, sec. 1. We cannot, therefore, declare this contract void, without saying that the motives assigned for it are improper, and the objects intended mere pretences, neither of which are alleged or proved.

The counsel for the plaintiffs, and the Judge of the District Court, rely much upon the Council being restricted in the power of taxation. The only restriction is, that taxes shall not be laid for purposes not contemplated by the acts of incorporation; and this brings us back to the main question of power. The other arguments of the judge and counsel resolve themselves into the same question.

The counsel for the plaintiffs say that it is not just, and that the corporation has no right to issue bonds that will bind posterity, or the people who may be alive in 1862. If the corporation has a right to purchase real estate, there is no restriction as to whether it shall be for cash or on credit; it may, therefore, lay taxes to pay debts incurred for property, and if it be of a description that will benefit the future generation as much as the present, we see no serious objection to making those who succeed to the benefit bear a share of the burden.

If the power to purchase be established, the power to give the evidence necessary to secure the price necessarily ensues, and whether the credit be long or short is a matter of indifference. We see no force in the argument, that because the members of the Council are only elected for one year, no obligation, having more than one year to run, is legal. The obligation is that of the corporation, which is perpetual; the change of agents no way affects the question, otherwise the length to which the credit could be extended, would be shortened in proportion as the terms of

service of the members had elapsed and would finally be reduced to a single day.

It appearing to us well established by our own legislation, that civil corporations can acquire and possess real estate; that, by the jurisprudence of our sister States, it is an incident to every corporation to have the capacity to purchase lands and chattels unless restricted, and that all have the absolute *jus disponendi*, neither limited as to objects, nor circumscribed as to quantity; and it being further established that the agents of corporations stand very nearly, if not precisely, in the same situation as individual agents, we are compelled to believe the opinion of the first judge erroneous; and it must be reversed. Civ. Code, art. 430. 2 Kent's Com. 227. Angel on Corporations, 104.

The judgment of the District Court is, therefore, reversed; and ours is in favor of the defendant, with costs in both courts.

Roselius and *Preston*, for the plaintiffs.

Grymes, for the appellant.

THOMAS URIE v. J. B. STEVENS.

When the owner of property has lost all control over it, and cannot change its destination, it cannot be attached by his creditors.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Emerson*, for the appellant.

Rawle, contra.

MARTIN, J. The plaintiff having obtained judgment against the defendant, caused Burke, Watt & Co., garnishees in this case, to be served with a rule to show cause why judgment *pro confesso* should not be rendered against them, condemning them to pay to the plaintiff the amount of the judgment rendered against the defendant, or at least the value of the property of the defendant in their hands, or which may have been in their possession since the institution of this suit; and he is appellant from a judgment discharging that rule. The Commercial Court was of opinion that the evidence established an actual advance, together with an assump-

tion, on the part of the garnishees and their agent, covering the whole proceeds of the cotton in their hands. Our attention is arrested by a bill of exceptions, taken by the plaintiff and appellant. The attorney for the garnishees offered the depositions of two witnesses, to show as well the advances made by the garnishees to the defendant Stevens, as to prove that the agent of the garnishees at Vicksburg had entered into an agreement with an agent of Turner & Woodruff, to pay to the latter any balance that might remain, after the reimbursement of the advances of the garnishees, from the sales of the cotton in their hands. The plaintiff's counsel objected to the reading of so much of the depositions as tended to establish the agreement of the garnishees' agent with that of Turner & Woodruff. The objection was overruled, the court considering that the regular mode of proceeding would have been to call on the garnishees for supplemental answers, and when those answers were made, that the plaintiff might have traversed them; but that as the parties saw fit to go to trial on this rule without doing so, and as any supplemental answers must have been based on information obtained from persons whose evidence has already been taken, the case should be settled on the evidence now offered. It does not appear to us that the court erred. The principal objection to the evidence of the agreement between the garnishees' agent at Vicksburg and the agent of Turner & Woodruff, is that the agreement is not binding on the garnishees. This objection appears to us of little moment, as it goes only to the relevancy of the evidence. The appellant's counsel has contended that the rule was improperly discharged, because the garnishees' answers to the interrogatories were not full, clear, and categorical. The garnishees answered that they had twenty-eight bales of cotton in their hands, the property of the defendant; they did not deny that they had other property, nor did they state the value of the cotton. Being asked whether they were indebted to the defendant, they answered that they could not state their situation with respect to him, without knowing whether any, and what advances had been made by their agent in Vicksburg to the defendant on the cotton. We think with the judge *a quo*, that the plaintiffs might, or, indeed, ought to have insisted upon full answers to their interrogatories. But this they neglected to do. It has next been

contended that the depositions were improperly admitted to prove any thing but the advances, as the agreement on file is confined to the introduction of evidence of advances made by the garnishees. We cannot say that the first judge erred in considering the agreement as extending to advances actually made in cash, to goods furnished by the garnishees to the defendant, and to a promise to pay the money due to Turner & Woodruff.* Lastly, it is urged that the promise to pay Turner & Woodruff's claim was not binding on the garnishees, and gave them no privilege on defendant's funds in their hands, to the prejudice of third persons. The first judge was of opinion that there was an assumption by the garnishees of Turner & Woodruff's debt. In this we do not concur with him, if he meant to say that the garnishees incurred the obligation to pay it, even if, by any accident or legal proceedings, they should be prevented from realizing, by the sale of the cotton, a greater sum than they were entitled to retain on account of their advances. The evidence shows that the cotton was received by the garnishees under an engagement taken by their agent in Vicksburg with the defendant, or his agent, and the agent of Turner & Woodruff, that the garnishees should sell the cotton, and apply the proceeds to the reimbursement of their advances thereon, and to the payment, as far as the balance would go, of the claim of Turner & Woodruff. It is, therefore, clear that the defendant had lost the right to resume the cotton from the hands of the garnishees, and give it any other destination, to the injury of either the garnishees or of Turner & Woodruff, than that under which the garnishees had received it, in conformity to an agreement to which the defendant, the garnishees, and Turner & Woodruff were parties. If so, the plaintiff could not attach it; for it is a general rule that, where the owner of the property has lost all power over it, and cannot change its destination, creditors cannot attach. *Babcock v. Malbie*, 7 Mart. N. S. 130. *Benjamin & Slidell's Digest*, 47, and cases there cited. 13 La. 570.

Judgment affirmed.

* An agreement was entered into by the counsel in this case, to this effect: "That on the trial of the rule, the garnishees may introduce evidence to show that advances have been made by them on the cotton attached, and the amount thereof."

GREEN DAVIDSON v. JOSEPH M. KEYES and another.

The acceptor of a bill has no right to inquire into the consideration between the drawer and payee, or between the latter and a subsequent indorsee. If he pay the bill, he cannot be affected by any want or failure of consideration which the drawer, or payee may set up.

It is no defence to an action on a bill drawn under an unconditional authority, to allege that the authority should have been used in a particular way. Though the holder of the letter of credit abuse the confidence reposed in him, by applying it to purposes not contemplated or improper, the party who gave the letter cannot complain of the acts of one whom he trusted with an unconditional authority.

The holder of a negotiable instrument is not required to prove the consideration which he gave for it, unless specially called upon by the answer so to do.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. This action is brought by the indorsee of a bill of exchange, drawn upon the defendants by Clymer, Polke & Co. of Charleston, Mississippi, to the order of George Morgan McAfee, by whom it is alleged to have been indorsed, and delivered to the petitioner, together with a letter of credit in pursuance of which it was drawn. The letter is in the following terms, to wit :

New Orleans, 11th June, 1838.

Messrs. Clymer, Polke & Co.

Gentlemen :—We hereby engage to accept your draft on us, to fall due after the 1st of March, 1840, to the extent of four thousand dollars.

Very respectfully, your ob't servants,

KEYES & ROBERTS.

The draft bears date the 8th of December, 1839, and was made payable ninety days after date. The answer denies all indebtedness to the plaintiff, and avers that the letter of credit was not given by the defendants, or by any one authorized by them to give it, and that the plaintiff was duly informed, before the bill came into his possession, that no such letter of credit had been given by the defendants, and that they would not accept, or pay at maturity any bill drawn under the same. The answer further pleads that no consideration was ever given to Clymer, Polke & Co. for the letter, and that the plaintiff had notice of that circumstance.

There was a judgment below in favor of the defendants, and the plaintiff has appealed.

The first ground of defence set forth in the answer has not been insisted upon in this court, to wit, that Gamble, the clerk of the defendants, who signed the letter of credit, was not authorized to do so. It rested on the same evidence as that given in the suit of Mosely against the same defendants, reported in 18 La. 46. But it is urged on the part of the defendants, that no advance was made on, nor credit given to their gauranty, and that Clymer, Polke & Co. did not make a fair and legitimate use of their letter of credit, they having employed it to pay the existing debt of a third person. The evidence shows that one A. H. Davidson having applied to Morgan McAfee for the payment of a debt of about \$3200 due to him by the latter, McAfee offered to give him a draft on some house in New Orleans, but at the same time told him that he had no authority to draw, and that Davidson declined the offer, whereupon Clymer, one of the firm of Clymer, Polke & Co., who was present at this conversation, said that he had authority to draw for \$4000 on Keyes & Roberts. Davidson having expressed his willingness to take such a draft, it was agreed that Clymer should draw in favor of McAfee for the whole sum, that the draft should be given to A. H. Davidson in payment of his debt, and that Davidson should pay the difference to Clymer, Polke & Co. The arrangement was accordingly made. It does not appear at what time the letter of credit was placed in the hands of A. H. Davidson, but in a letter which he wrote on the 25th of December, 1839, to his merchant in New Orleans, requesting him to inform Keyes & Roberts that he had bought this draft on them, he mentions the letter of credit as accompanying the draft. A. H. Davidson tried to have the bill discounted at a bank at Memphis, and it was understood that out of the proceeds he was to retain the debt due from Morgan McAfee to himself, and pay the balance to Clymer, Polke & Co. The draft not having been discounted, Davidson made an arrangement with the drawers by which he paid the balance accruing to them, and thus became the owner of the bill. The judge below was of opinion that the defendants were not bound under their letter of credit to pay this draft, because Clymer, Polke & Co. made use of the credit given them entirely out of the

ordinary range of the purposes for which letters of credit are generally given ; he was also of opinion that the draft could not be considered as having been taken in the usual course of trade, and that the present plaintiff, not having proved that he gave a valuable consideration for it, cannot recover. We do not acquiesce in these views. An acceptor of a bill has no right to inquire into the consideration between the drawer and payee, or between the latter and a subsequent indorsee ; if he pay the bill, he cannot be affected by any want or failure of consideration which the drawer or payee may set up. 4 Mart. N. S. 286. The defendants gave Clymer, Polke & Co. an unconditional authority to draw on them to a certain amount, and it is no defence to an action on a bill drawn under such authority, to say that it should have been used in any particular way. We believe that in most cases a letter of credit, or authority to draw, is given by a merchant with the view, and for the purpose of aiding the party obtaining it in some commercial business or enterprise which it is supposed will redound to the mutual benefit of both parties ; but if the holder of the letter of credit abuse the confidence reposed in him, and apply the credit to purposes however different or improper, the merchant is bound by the acts of the person he trusted, and cannot complain of the use made of an authority he thought proper to give without annexing to it any conditions. Neither can it be said that A. H. Davidson received the bill without giving a valuable consideration for it. He took it in payment of a debt of \$3200 due to him, and paid the surplus to the drawers. If the latter were not indebted to Morgan McAfee, whose debt to Davidson they paid, they acquired against him a claim to that amount. If they were so indebted, their debt has been thus extinguished, and they must be considered as having received the amount. Although it does not appear from the evidence that the letter of credit was actually shown to Davidson at the time the agreement took place, it is clear that his consent to take the draft in payment of his debt was based on the information and assurance given him by Clymer of his authority to draw on the defendants, and that the letter containing that authority was placed in his hands by the persons having the power to dispose of it. As the evidence shows him to have been in possession of defendants' letter of credit when he ad-

vised the latter of his having bought the draft, it is but fair to suppose that it was given to him with the draft. The ineffectual attempts made by Davidson to have the draft discounted at Memphis, do not show that the draft was taken without reference to the guaranty. They only evinced his desire to cash it. Had he succeeded, he would probably have transferred to the Bank, the letter of credit, as well as the draft.

It has, further, been argued, that the draft was not drawn within a reasonable time after the date of the letter of credit, and that the draft was not so connected with, or pointed to by the letter of credit as to bind the defendants to its acceptance and payment. According to the terms of the credit the bill was to fall due after the first of March, 1840. By being made on the 8th of December, payable at ninety days, it fell due but a few days after the time prescribed. It might in our opinion have been drawn a month or two later, and yet have been drawn within a reasonable time. Some discussion took place at the bar in relation to the word *draft* used in the letter of credit, which, in one part of the record, is in the singular, while in another part it is in the plural number. We have referred to the original on file in the inferior court, and find that the word *draft*, and not *drafts* is used, thus we think sufficiently describing the bill promised to be accepted. *Coolidge v. Payson*, 2 Wheaton, 66. The plaintiff was not bound to prove the consideration he gave for the draft sued on, as he was not specially called upon by the answer to do so. 2 La. 455.

It is, therefore, ordered that the judgment of the Commercial Court be reversed, and that there be judgment for the plaintiff, and that he recover of the defendants *in solido*, the sum of four thousand dollars, with legal interest from the 10th of March, 1840, until paid, with costs in both courts.

Anderson, for the appellant.

Jennings, for the defendants.

SUCCESSION OF GUILLAUME DAZET SENAC.—J. M. DUPERU, and others, Appellants.

By the laws of France the widow becomes the tutrix of her minor child immediately after the death of her husband, and needs no letters of tutorship to act as such; and, by the same laws, she is entitled to the enjoyment of all the property of her child, until he reach the age of eighteen, or be emancipated. A widow, residing in France, may oppose in the courts of this State, the homologation of the will of her husband, and stand in judgment for her child.

The testator, a resident of Louisiana, made an olographic will on the 8th of May, 1836.

On the 10th of the same month, he married, and on the next day sailed, with his wife, for France, intending to reside permanently in that country. On the 10th of April, 1837, a child was born of the marriage, and in August, 1838, the testator died. *Held*, that under arts. 483, and 10, of the Civil Code, the will having been made in this State, its validity must be tested by the laws of Louisiana, and not by those of France. A will is not revoked, under the laws of France, by the subsequent birth of a child. *Aliter*, in this State. Civ. Code, art. 1699.

The only exception to the rule laid down in article 483. of the Civil Code, "that persons who reside out of the State cannot dispose of property they possess here, in a manner different from that prescribed by its laws," is to be found in the 10th article of the Code; and it is only under the conditions mentioned in that article, that foreign laws are permitted to operate in the disposition of property in this State.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

MORPHY, J. This appeal is from a judgment declaring null and void the last will and testament of the late G. D. Senac, on an opposition to its homologation by his widow, on the ground of the birth of a child, the offspring of the opponent's subsequent marriage with the deceased. The facts of the case are, that the late G. D. Senac, a native of France, who had long resided in this country, made his olographic will in this State on the 8th of May, 1836, whereby he made several legacies, and bequeathed their freedom to two of his slaves under certain restrictions. On the 10th of the same month, he married Marie Tourné, the opponent, of this city, and on the next day departed with her for France, where, on the 10th of April, 1837, she brought him a child. Senac died at Bagnières de Bigorre, on the 27th of August, 1838. The testimony shows that the deceased several times expressed to his friends his intention of passing the remainder of his life in France, and that his property here

consisted of one hundred shares of the stock of the Commercial Bank, of several slaves, and some notes and accounts.

Schmidt, for the legatees. The widow having no interest in the will, cannot sue to annul it. The capacity of the testator to dispose of his property, and the validity of such dispositions, must be determined by the law of his actual domicil. *Habilis vel inhabilis loco domicilii est habilis vel inhabilis in omni loco.* Journal du Palais, v. 13, p. 17. Story's Conf. of Laws, 398—402. The domicil of the testator was in France. By the laws of that kingdom the subsequent birth of a child does not revoke a will. Dalloz, Jurisp. XIX Siècle, v. 11, p. 191—2. Though the will should be, in other respects, annulled, bequests of freedom are valid under the general rule of the Roman law. Digest, 28, tit. 4, § 3.

J. Seghers, for the opponent.

MORPHY, J. The legatees deny the right of the opponent to sue in her own name, or as the widow of the deceased. It is said that her son, as an heir of the deceased, has an interest to set aside this will, but that she has none. We can see no reason to doubt the capacity of the opponent to stand in judgment for her child. By the laws of France, where she now resides, she became *ipso jure* the tutrix of her son on the death of her husband, and needed no letters of tutorship to act as such. But, independently of this right of suing on behalf of her child, the opponent has a personal interest in the matter, because, by these same laws, she is entitled to the enjoyment of all her child's property until he reaches the age of eighteen years, or is emancipated. Code Nap. arts. 390, 384.

On the merits, it is contended that the will of Senac did not become void, by the birth of a child from his subsequent marriage with the opponent. It is admitted that under art. 1698 of the Civil Code, there would be no question as to the nullity of this will, had the testator continued to reside in Louisiana; but the argument is, that when the validity of a will is in question, reference must be had to the time of the death of the testator. That, at that time, he was residing in France, and that by the laws of his new domicil which are to govern, the subsequent birth of a child did not invalidate his will. It appears to us that this case presents but the single question, whether the law of Louisiana, under which this will was made,

and which pronounces its nullity in case the testator have legitimate children posterior to its date, is to have its effect? If it is, the will of Senac became absolutely void on the 10th of April, 1837, when the child was born, as much so as if it had been expressly annulled and revoked by the testator himself. 5 Toullier, No. 313. In such a case the testator, who has not made a new will, must be considered as having died intestate. In support of the position taken by the counsel for the appellants, we have been referred to several passages of the valuable treatise of Judge Story on the Conflict of Laws, establishing generally the doctrines that a will of personal property, regularly made according to the law of a testator's domicil, is sufficient to pass such property in every other country in which it is situated, and that the capacity of the testator is to be determined by the law of his actual domicil. These principles are undoubtedly correct, and would be applicable, were this a testament made in France, disposing of moveable property situated here. Even then we would have to be governed, not by the general principles of international law, which on this subject are not free from doubt and uncertainty, but by our local laws which have provided for such a case. The general rule is laid down in article 483 of the Civil Code, which provides that "persons who reside out of the State, cannot dispose of the property they possess here, in a manner different from that prescribed by its laws." The only exception to this rule is to be found in the 10th article of the Code, which establishes another general rule applicable to this case. It provides that, "the form and effect of public and private written instruments, are governed by the laws and usages of the places where they are passed and executed. But the effect of acts passed in one country to be executed in another, is regulated by the laws of the country where they are to have effect. The exception made in the second paragraph does not hold, when a citizen of another State of the Union, or a citizen or subject of a foreign state or country, disposes, by will or testament, or by any other act *causa mortis*, made out of this State, of his moveable property situated in this State, if at the time of making said will or testament, or any other act *mortis causa*, and at the time of his death, he resides and is domiciliated out of this State." It is only under the conditions mentioned in

this article, that our laws recognize and permit the operation of foreign laws on wills disposing of property here. In all other cases the law of this State is to govern. In the present instance the will having been made in Louisiana, and the property of the deceased being situated here, we can see no good reason why our law should be superseded by that of France. Article 1698 may in some measure be considered as a tacit resolutive condition, on the happening of which the will was to become void. Of this the testator must have been aware when he left his will behind him, to be carried into effect under our laws. This provision of our Code is founded on the presumption that he would not have made such a will, had he foreseen that he would thereafter have children. If, as has been remarked, the testator did not revoke this will during the sixteen months that he survived the birth of his child, it is fair to presume that it was because he knew that by the law of Louisiana, under which it was made, it had become a nullity on the birth of such child.

It has further been urged that even if the will be declared void, the bequests of freedom to the slaves Rose and Mathilda are valid, and should be carried into effect; and we have been referred to the Roman Digest, book 28, tit. 4, § 3. It could hardly be expected of us to adopt as a rule to be followed the decision of the Emperor Antoninus in relation to a succession, claimed by the Treasury on account of a will that had become void for the want of instituted heirs. He decided in his liberality that certain slaves emancipated by the will should be set free, notwithstanding its nullity; but this decision was obtained from his munificence, and not on principles of strict law. *Quod nullum est, nullum producit effectum.*

Judgment affirmed.

SAME CASE—APPLICATION FOR A RE-HEARING.

The meaning of the third paragraph of art 10 of the Civ. Code, is, that the rule that the effect of acts passed in one country to be executed in another must be regulated by the laws of the latter, does not hold in relation to testaments and donations *mortis causa*, where the testator or donor resided abroad when the act was executed and at the time of his death. It is only when both these circumstances occur, that he will be considered as having made his will with reference to the laws of his domicil.

Schmidt, for a re-hearing. Had the will been written at sea, or in France, it must have been regarded as the will of a Frenchman, subject to the laws of that country. Where, as in the present case, the testator, apprehensive of the dangers of the sea, resorted to the precaution of executing his will two days before his departure, it cannot be viewed in a different light. Story, Conflict of Laws, sec. 479, p. 402, 2nd edit. says, "where a native of Scotland, domiciled in England, having personal property only, executed, during a visit to Scotland and deposited a will there, prepared in the Scotch form, and died in England, it was held that the will was to be construed according to the English law."

BULLARD, J. A re-hearing has been prayed for in this case, and the question of law on which the case is supposed to turn has been elaborately argued. We have thought it proper to state the reasons which, after full consideration, have induced us not to accede to the prayer of the petitioner.

The facts are simple and undisputed. Senac married, and made his will in New Orleans, and sailed shortly after for France, where he passed the rest of his days. A child, the issue of the marriage, survived him. The question is, whether the birth of the child revoked the will according to the laws of Louisiana, so far as it relates to the property situated here. The judgment first pronounced adopted the affirmative.

We admit the general principle contended for. It is sustained by ample authority, and has been uniformly adhered to by this court, in which questions of this kind more frequently arise than perhaps in any other in the Union. The doctrine is so well settled, that it has been enacted as a formal article of our Code. "The form and effect of public and private written instruments are governed

by the laws and usages of the places where they are passed or executed. But the effect of acts passed in one country, to have effect in another country, is regulated by the laws of the country where they are to have effect." Civ. Code, art. 10.

The argument on the other side is, in substance, that although this will is to have its effect here, yet that the testator being domiciliated in France at the time of his death, and the will having in law no date until the moment of the death of the testator, it must be considered as a French will, and construed according to the laws of France, and consequently that it was not revoked by the subsequent birth of a child. But the same article creates an exception in relation to testaments or other dispositions *mortis causa*, which takes them out of the general rule, and requires, in order to give effect to them, as to moveables, as foreign dispositions, that the donor or testator should be domiciliated abroad both *at the time of making such will or donation, and at the time of his death*. The words of that clause of the 10th article are: "The exception made in the second paragraph of this article does not hold when a citizen of another State of the Union, or a citizen or subject of a foreign State or country, disposes by will or testament, or by any other act *causa mortis*, made out of the State, of his moveable property situated in this State, if, at the time of making said will or testament, or any other act *causa mortis*, and at the time of his death, he resides and is domiciliated out of this State." Civ. Code, art. 10. The meaning of this clause, although obscurely expressed, we take to be, that although in general the effect of acts passed in one country to have their effect in another, is regulated by the laws of the latter country, yet in relation to testaments and donations in prospect of death, this does not hold where the testator or donor resided abroad both when the act was executed and when he died. In other words, that a will or donation *mortis causa*, in order to have its effect here as a French will, must have been made in France, and the donor must have died there. If made here, and the testator died there, it will be governed by the local law, the *lex rei sitæ*. It is only when both these circumstances concur, that he shall be considered as making the donation with reference to the laws of his domicil. The law of Louisiana is, "the testament falls by the birth of legitimate children of the

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testator, posterior to *its date*." Civ. Code. Art. 1698. The law in France is understood to be different. The testament was made here, to operate upon property situated here, and the testator died domiciliated in France, after the birth of a legitimate child. In order to be regarded as a foreign will, it ought also to have been made or written in France, according to our understanding of article 10. In that event, the personal property here would have passed by it, notwithstanding the posterior birth of a child.

It is, therefore, ordered that the judgment first pronounced remain undisturbed.

JOHN WALSH and another v. FRANÇOIS MAZERAT and another.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN, J. The defendant, Mazerat, was engaged by his co-defendant, Le Goaster, to build four houses, and the plaintiffs, workmen employed by Mazerat, instituted this suit for the price of their labor, and took an order of provisional seizure against Le Goaster to obtain a sum which they allege to be due by him to his co-defendant; and Le Goaster is appellant from a judgment against him. He had engaged to make four equal payments, the third of which was to be effected when the joiners' work should be completed, and the last on the delivery and acceptance of the houses. Mazerat engaged to make this delivery on the 15th of September, 1839, and in case this was not then done, to pay rent at the rate of sixty dollars per month for each of the houses. There is no dispute as to the amount of the plaintiffs' claim against Mazerat; but they contend that the third payment was made by anticipation, and that Le Goaster has no right to deduct from the last, the rent which he claims in consequence of the delivery of the houses not having been made on the day stated in the contract. The judge below disallowed the claim in regard to the third payment, and allowed that which relates to the last. The third payment was made to Mazerat on the 27th of December, 1839. It is urged that the joiners' work was not then com-

pleted, and that Le Goaster employed Fortier to complete it, and paid him therefor \$200 on the 15th of February, and \$217 on the 26th, in the whole \$417. The order of provisional seizure against Le Goaster was not issued until the 28th of the same month. It is, therefore, clear that if the four hundred and seventeen dollars which remained due by Le Goaster, notwithstanding the receipt he had taken from Mazerat for the third payment, had been seized before the payments made to Fortier in February, the plaintiffs would have been entitled to that sum; but the joiners' work having been completed, and full payments made therefor before the order of provisional seizure was issued, Le Goaster was under no obligation to delay the completion of the payment to afford the plaintiffs an opportunity to seize. It appears that the last payment was effected by a deduction of \$369 42 by Le Goaster, from what was due to Mazerat, on account of the rent which he engaged to pay for the delay in delivering the houses after the 15th of September. All parties agree that, as to Le Goaster and Mazerat the allowance was correctly made; but the plaintiffs contend that it was otherwise as to them, and so the judge below thought. Mazerat was to pay the rent on the delivery of the houses; his obligation to pay it, and his right to receive the last payment, arose simultaneously, unless we conclude that the rent was payable on the 15th day of each month after September, which would not be a forced construction. It is difficult for us to see any difference between the obligation of Le Goaster to make the last payment, coupled with that of Mazerat to pay the rent on a given day, and the obligation of the former to make the third payment *minus* the rent.

It is therefore ordered, that the judgment of the Commercial Court be reversed as far as it relates to the appellant, Le Goaster, and that ours be for him, with costs in both courts.

Benjamin, for the plaintiff.

C. Janin, for the appellant.

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WILLIAM WEBB LYON and another v. THE COMMERCIAL INSURANCE COMPANY.

The act of 6th March, 1840, directing the mode of composing and drawing juries for District Courts, does not apply to the First Judicial District, in which juries are not required to be drawn twenty days before each term of the court.

A formal writ of *venire facias* is not required by the laws of this State in any case.

An order of court for drawing and summoning jurors is sufficient.

Since the act of 25th March, 1831, prescribing the qualifications of jurors, does not require that they should be housekeepers, it may well be doubted whether that qualification, prescribed by art. 506 of the Code of Practice, is now necessary.

One who resides in the parish, and pays a tax and house rent, is a *housekeeper* in the meaning of art. 506 of the Code of Practice.

The owner, or tenant of a house, insuring against fire, is not bound to disclose or communicate to the insurers the names or pursuits of sub-tenants living on the premises.

If the insurers wish to guard against the risk from certain pursuits or occupations of tenants or sub-tenants, they have it in their power to insert in the policy a warranty to that effect, which being a condition precedent, whether material or immaterial to the risk, must be complied with, before any action can be maintained on the policy.

The owner of a house which has been insured, has a right to have it occupied by any one he pleases, provided the occupations of such persons, or the property placed in the house, is not of a nature to vitiate the policy under the conditions relative to hazardous or extra-hazardous risks.

Where a stock of goods in a house are insured, the manner in which the rest of the building is occupied, cannot affect the policy, unless some warranty has been made in relation thereto, or there has been a concealment or misrepresentation of facts deemed by the jury material to the risk.

Where, pending the negotiations for a policy, the insurers expressed an objection to insuring property in the neighborhood of gambling establishments, and the applicant knew at the time that there was such an establishment within the premises in which the property was insured, it will be left to the jury to say whether this was a fact, the concealment or misrepresentation of which was so material to the risk, as to vitiate the policy. It is of no consequence whether it was considered material to the risk by the insurers; it must be considered so by the jury. Where a fact, not provided for by a warranty on the face of the policy, is concealed, it cannot affect the right to recover, unless material to the risk, when it avoids the policy on the ground of fraud or of its having misled the insurers; and in all such cases the materiality of the facts concealed or misrepresented must be left to the jury, who are the proper judges whether the risk has been thereby increased.

APPEAL from the Commercial Court of New Orleans, Watts, J. MORPHY, J. The plaintiffs seek to recover \$15,000, on a policy of insurance against fire on their stock in trade, consisting of

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clothing, hats, &c., in a store, No. 11, Front Levée street. The insurance was effected for one year from the 9th of December, 1839, and the goods insured were destroyed by fire on the morning of the 27th of March, 1840. The defence set up to this claim is, in substance, that before, at the time of, and after the execution of the policy, the plaintiffs withheld from the Company important information material to the risk. The facts alleged to have been concealed were the names and occupations of the tenants on the premises; and it is averred that the risks of the defendants were greatly increased by such concealment, because the pursuits and occupations of the tenants were of a nature to endanger the safety of the premises. This case was tried by a jury, who rendered their verdict in favor of the plaintiffs. The company appealed, after an ineffectual attempt to obtain a new trial.

Durant and Grymes, for the plaintiffs.

Lucius C. Duncan and Isaac T. Preston, for the appellants. There was a concealment of material facts which greatly increased the risk, and which would have prevented the contract had they been known to the defendants. The omission to state material circumstances, though the result of accident or neglect, will vitiate the policy. *A fortiori*, where any suppression or misrepresentation has proceeded from a fraudulent purpose. *Ellis on Fire Ins.* 23. *Ratcliffe v. Shoolbred*, 1 Park, 270, 7th ed. *Carter v. Boehm*, 3 Burr. 1905. See 2 Park on Insur. 99, 100, and 2 Peters, 49, 50, as to the facts which the assured is bound to disclose.

MORPHY, J. Our attention was first called to a bill of exceptions, to the opinion of the inferior judge disregarding a challenge to the array, on the ground that no writ of *venire* had issued to the sheriff for the summoning of the jury, and that the jurors had not been drawn twenty days before the commencement of the term for which they were to serve. It appears from the record that, on the 20th of April, 1840, an order was entered on the minutes directing a *venire* to be issued for the drawing of forty-eight jurors to serve during the ensuing month of May, and commanding the sheriff to summon the jurors to be and appear in court on the 11th of May following, at 11 o'clock A. M.; that, in fact, no *venire* was issued to the sheriff who, under this order,

drew a jury, with the clerk of the court, on the 22d of April, 1840, and summoned them to attend; that a sufficient number of jurors to serve not having been obtained, another drawing was ordered on the 11th of May, which also took place in the presence of the sheriff and clerk, and the additional number of jurors was summoned. On the 13th of May, when this case came on to be tried, it appearing that no *venire facias* had issued, the judge ordered that a writ of *venire* should be issued tested *nunc pro tunc*, and that the sheriff should forthwith make his return thereon, which was accordingly done. For the law in support of this challenge to the array, we have been referred to the third section of an act passed the 6th of March, 1840, directing the mode of composing and drawing juries for the District Courts. B. & C.'s D. p. 527. This statute does not, in our opinion, apply to the First Judicial District, in which juries continue to be drawn and summoned according to the anterior laws on subject, which do not require that juries should be drawn twenty days before the ensuing term. This delay was found necessary in the country for the convenience of jurors, living sometimes at a great distance from the seat of justice, and to afford the sheriff the possibility of summoning them a reasonable time before the opening of the court. But even if the statute invoked were applicable, it would not assist the appellants much, as it requires, section 5th, that all objections on account of any defect or informality in the formation, drawing, or summoning of the jury, shall be urged on the first day of the term and not afterwards. As to the want of a *venire facias*, it appears to us that the order of the court for the drawing and summoning of the jury, of which a certified copy was placed in the hands of the sheriff, was for that officer as good a warrant to summon the jury as a formal writ of *venire*, the issuing of which we find provided for in none of our statutes on the subject. Another bill of exceptions was taken to the opinion of the judge, overruling an objection made to a juror on the ground that he was not a housekeeper according to article 506 of the Code of Practice. Among the qualifications necessary to be a juror, as required by the statute of the 25th March, 1831, which is the last enactment on the subject, we do not find that of being a housekeeper. It may well be doubted whether this qualification is now

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necessary ; but even if it were, A. G. Cochran, the juror objected to, declared on his *voire dire* that he resides in the parish, pays a tax as a merchant, and pays also house rent. - We think that he might well be considered as a housekeeper in the meaning of the article of the Code, and that the objection made to him was properly overruled.

On the merits, there is no dispute as to the value of the goods destroyed, and no charge of fraud is set up against the plaintiffs. The only defence is, that the assured, who rented the second story of the building they occupied to one Cornell, and knew that he kept in it a gambling establishment, did not communicate the fact to the defendants; and that such concealment was material, as the fact concealed greatly increased the risk, and would have prevented them from insuring had it been made known. The evidence shows that the building in which the goods insured were stored was four stories high, and belonged to one Kohn, and that the plaintiffs had a lease of it for a term of years ; that they never occupied the whole of the premises themselves, but sub-leased from time to time the second and fourth stories ; that the fourth story, which had been let to a militia company some time before, was unoccupied at the time of the fire, but that the second story was then occupied by one Cornell. The testimony leaves little doubt in our minds that this tenant kept a gambling house in the rooms he rented from the plaintiffs, and, moreover, renders it probable, that the plaintiffs knew the fact. Armstrong, the secretary of the Company, testifies that when application was made for insurance, he went with the plaintiffs to take a general view of the premises ; that in a conversation he then had with Lyons, in relation to the gambling establishments in the neighborhood, he stated the objection he should have to taking risks near these establishments. This witness thinks that Lyons replied, that he did not know there were any such there, and that if there were, it would most likely be in the corner store ; and that he then remarked to Lyons that there was an intervening store, that he knew the stores to be well built, and that he would, therefore, take the risk ; that plaintiff at the time gave no intimation that he had under-leased any part of the premises, or that he had the intention to do so ; that had he (the witness) been informed at the time, that there were sub-

tenants on the premises, he would, before taking the risk, have made inquiry to ascertain the occupations and business of the sub-tenants, &c. On the trial of the case the counsel for the underwriters requested the court to charge the jury that, if they believed that the plaintiffs were tenants by the year of the store in which the property insured was, they (the plaintiffs) were bound to inform the Company if there were any sub-tenants in the premises, and who they were. The court refused so to charge the jury, but on the contrary instructed them that the plaintiffs were not bound to inform the defendants if there were any sub-tenants, nor what their occupations were, the more especially as the insurance was not on the store, but on a stock of goods in it; and that if the jury believed that, pending the negotiation for the policy, the defendants, through their agents, had objected or expressed an unwillingness to insure property in the neighborhood of gambling establishments, and that the plaintiffs at the time knew that there was one within the premises in which was the property insured, the court would leave it to them to say whether this was a fact, the concealment or misrepresentation of which was so material to the risk, as to vitiate the policy, and that it was of no consequence whether it was material in the opinion of the defendants or their agent, but that it must be considered material to the risk by the jury themselves. The judge further instructed the jury that, where a house was insured, the owner of the house had a right to have it occupied by any person he pleased, provided the occupations of the persons, or the property in it were not of such a nature as to vitiate the policy under the conditions relative to what was considered hazardous or extra-hazardous risks; that where a stock of goods which were in a part of a house or store, were insured, the manner in which the rest of the house was occupied did not affect the policy, unless the insured had made some warranty in relation thereto, or unless there had been a concealment or misrepresentation of facts deemed by the jury material to the risk. To this charge of the judge, and to his refusal to instruct the jury as prayed for, the defendants took a bill of exceptions.

The charge of the judge appears to us substantially correct. No case, it is believed, can be referred to, in which it has been held that the owner of a house, or a tenant on a lease for years, is

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bound to disclose or communicate to his underwriters the names and pursuits of the tenants, or sub-tenants, living on the premises. If the insurers wish to guard themselves against the risk or dangers supposed to result from certain pursuits or occupations of the tenants, or sub-tenants of houses on which they make insurance, whether it be on the property itself, or on goods in it, they have it in their power to insert in the policy a warranty to that effect. Being considered as a condition precedent, a warranty, whether material or immaterial to the risk, must be complied with, before the assured can maintain an action on the policy ; but where a fact, not provided for by the warranty appearing on the face of a policy, is concealed, it cannot affect the assured's right to recover, unless it be material to the risk, for then it avoids the policy on the ground of fraud, or because the underwriters have been misled. But, in all cases of this kind we take the rule to be well settled, that the materiality of the fact concealed or misrepresented is to be left to the jury. They are the proper judges of the fact whether the risk of fire has been thereby increased. 10 Pickering, 535. 2 Peters, 56. 7 Wen. 77. 6 Ib. 627. 1 Hall, 234, and note. In the present case the jury were called upon to decide whether the plaintiffs, at the time when the insurance was effected, knew that their tenant kept a gambling house in the premises, and whether the danger of fire was thereby greatly enhanced. After hearing all the evidence, they decided these questions of fact in the negative ; and we cannot say that they erred.

Judgment affirmed.

JOHN Y. DAVIS v. JAMES H. CALDWELL and others.

The court will not lend its aid to settle disputes relative to contracts, or transactions reprobated and forbidden by law. It will notice, *ex officio*, the illegality of the subject.

The grant by the legislature of a privilege to raise money by lottery, without any limit as to time, may be restricted by a subsequent law, before any rights have been acquired under the first. The permission to draw a lottery is not, *per se*, a contract ; and until it has been accepted, and rights have been acquired under it, is entirely within the control of the legislature.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

BULLARD, J. The plaintiff sues the defendants for a remuneration for services rendered by him in aid of their project to draw a lottery in 1839; and the defendants are appellants from a judgment condemning them to pay a small sum. We stopped the counsel for the plaintiff and appellee in his argument, and called his attention to the fact that lotteries were prohibited at that time by legislative authority, and that there could be no valid contract in relation to the drawing, or preparation to draw any lottery whatever, whereupon, the case was submitted without further argument. Upon looking at the points filed by the appellees, we find that this ground was taken; but if it had not been, we should consider it our duty to notice it as a peremptory exception, and not to lend the aid of the court in settling disputes relative to contracts and transactions forbidden by law.

Numerous privileges were granted by the legislature formerly to raise money by means of lotteries, in furtherance of some objects of public importance. In most instances, the time within which the privilege might be exercised was left indefinite, and, in 1833, the legislature thought proper to enact that the privilege of drawing lotteries, theretofore granted by different acts of the legislature, should expire on the 1st of January, 1834; and declared the act of selling a lottery ticket, or drawing a lottery highly penal, and punishable by fine and imprisonment. In 1838, an amendatory act was passed, extending the prohibition to all lotteries whatever, and by whomsoever authorized. Bullard & Curry's Digest, 547.

The record shows that the defendants, in defiance of these prohibitions, project a scheme for a great real estate lottery in the city of New Orleans, under what pretended authority we are not informed. This is shown by the correspondence between the parties. In a note addressed by the plaintiff to one of the defendants, he says: "Understanding that you are about to establish a real estate lottery in this city for the ensuing season, I beg leave to offer you my services in the sale of tickets, and in any other way in which I can be useful. I am about leaving the city for the north, to return about the first of October; could I be of service to you while absent, it would afford me great pleasure to

receive your commands." In answer, one of the defendants requested to be informed on what terms the plaintiff would be willing to give his undivided attention to the contemplated lottery, and the plaintiff named \$3500. A letter signed by the three projectors of the lottery, shows that such a lottery was set on foot by them, and that disputes had arisen in relation to the services of the plaintiff.

Under whatever pretext of right or authority this lottery was got up, it was clearly prohibited by law. It must have been under some supposed grant of the State previously to 1833, or under the assumed authority of some other State or Territory, or upon the mere personal authority of the defendants. On the two last suppositions, it is impossible to doubt its illegality. Upon the first, it may be urged that a privilege once granted, could not be revoked by the legislature; and that the law of 1833 was unconstitutional and void. The question, whether a grant of a privilege to raise money by lottery, at first indefinite in point of time, may be afterwards limited, before any rights have been acquired under the first grant, is one which, we think, presents no difficulty. Such an act does not, in our opinion, impair the obligation of a contract, nor destroy any vested rights. The permission to draw a lottery is not, *per se*, a contract, and until it has been accepted, and rights have been acquired under it, is perfectly within the control of the legislature; and the time within which it may be exercised, may well be determined by a subsequent law, without any violation of principles or rights.

The contract sued on being intimately connected with a speculation reprobated and forbidden by law, cannot be enforced in a court of justice. *Ex turpi causa non oritur actio.* 3 Mart. N. S. 46. 17 La. 118.

It is therefore ordered that the judgment be reversed, and that ours be for the defendants with costs in both courts.

Claiborne for the plaintiff. No counsel appeared for the appellants.

HENRY R. MENEFEE v. A. E. C. JOHNSON.

A principal is not bound by the act of an agent who exceeds his authority.

Where the petition prays for the rescission of a contract of sale or exchange, the plaintiff cannot be allowed either the price, or the value of the thing sold or exchanged.

Restitution of the thing itself can alone be decreed.

Plaintiff cannot amend his petition so as to change his claim for the price of certain slaves, into an action for damages for defendant's failure to give them up in compliance with his contract. C. P. 419.

A prayer for a jury is too late after the case has been set for trial. C. P. 494, 495.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. On the 5th of April, 1837, the parties to this suit entered into a contract by which the plaintiff agreed to give the defendant fourteen negroes, in exchange for two leagues and one labor of land, lying and being in the Republic of Texas, known by the name of John Lacy and Isaac Johnson's head rights, in Zavalla's colony or grant. It was further covenanted that, if the defendant should fail to execute to the plaintiff a good and sufficient title, clear of any and all claims whatsoever, then and in that case the negroes were to be given up by Johnson to one Samuel R. Browning, who, although he signed this contract only as a witness, became in reality a party to it, by agreeing to dispose of the negroes thus to be delivered to him for such lands as he might think proper for Menefee. On the same day and in pursuance of this contract, the defendant executed to the plaintiff two bills of sale for the two tracts of land given in exchange, in which they are more fully described, and to each of which tracts the price of \$6798 75 was affixed and was mentioned to have been paid in cash by the petitioner Menefee. In each of these acts of sale, Johnson binds himself to give the plaintiff "*a good and sufficient warrantee title,*" as soon as he and the plaintiff, or the latter's agent or attorney, can arrive at San Augustin in Texas, or within three months from date. Immediately after the execution of these covenants, the fourteen negroes were delivered to the defendant who proceeded with them to Texas, accompanied by Samuel Browning as the agent of the plaintiff, for the purpose of giving actual possession of the land. On their arrival in Texas, Browning went

upon one of the leagues or tracts referred to in the agreement, which he found occupied by a claimant who, in the language of the witness, was resolute in maintaining his title and possession; and he understood that the other league was possessed by a citizen of Texas, not less determined to maintain his possession and title. The defendant himself acknowledged his inability to give a clear title to the two leagues of land he was to convey to the plaintiff. Browning then called upon him, under the agreement, to re-deliver back to him the negroes. This Johnson refused to do, offering and insisting that he would convey other lands, in place of the two leagues for which he could not make out good titles. Browning, being unable to get the negroes, and believing, as he declares, that he could do no better for the interests of Menefee, accepted a bond of the defendant in the penal sum of \$13,597 50, with the following condition: "Whereas I have this day, the 8th of June, 1837, agreed to make a good and sufficient title to two leagues and one labor of land, in place of the two leagues and one labor which I transferred to H. R. Menefee, lying in Zavalla's colony, &c.

"The condition of this obligation is such, that I do agree to locate two leagues and one labor on lands lying west of the Trinity, and, furthermore, I do on my part agree to clear out of the Land Office, at my own expense, the said two leagues and labor for the said H. R. Menefee, and perfect to him a good and sufficient title to the said two leagues and labor as soon as practicable."

Under these facts the judge of the District Court decided, that the original debt or claim of the petitioner was extinguished by novation, Browning having been, in his opinion, sufficiently authorized to accept an agreement for the sale of other lands, in place of those sold to plaintiff on the 5th of April, 1837. Judgment was accordingly rendered in favor of the defendant, from which this appeal has been taken.

We cannot acquiesce in the view taken of this case by the judge *a quo*. It is admitted that Browning had no other authority except that derived from the original contract between the parties. He is therein empowered to dispose of the negroes, if returned to him, for such lands as he may think proper for Menefee. This, in our opinion, authorized him to take other lands in Texas in exchange for the negroes, either from Johnson, or from any other

person ; but surely did not warrant him in taking defendant's promise, that good and sufficient titles would be made to the plaintiff, as soon as practicable, to other lands, not particularly pointed out or described. It is but reasonable to suppose that for the lands which Menefee authorized his agent to take for his negroes, he intended that he should have the same *good and sufficient warrantee titles*, which he had stipulated for from the defendant in the first agreement. By taking this bond, which actually conveyed to the plaintiff no lands in exchange for his negroes, Browning, in our opinion, exceeded his authority, and the plaintiff was not therefore bound by his act. His rights under the original contract are the same as though this new arrangement had not taken place. But the plaintiff, by his own pleadings, has raised an insuperable obstacle to his recovery. In his petition he represents the several agreements above spoken of as constituting a sale of the fourteen negroes for \$13,597 50, which was to be paid by the conveyance of the two tracts of land ; and, after setting forth the facts of the case, he prays for judgment for that sum, with interest from the 5th of April, 1837. In a supplemental petition, filed shortly after, he prays that the contracts and agreements between himself and the defendants may be rescinded and annulled, and, as in the former petition, prays for judgment for \$13,597 50, and for general relief. Now, whether the contract between these parties be a sale or an exchange, it is clear that, under a prayer to rescind it, we cannot allow the plaintiff either the price, or the value of the thing sold or given in exchange. The effect of the dissolution prayed for being to replace the parties in the situation in which they stood before the contract, a restitution of the negroes can alone be decreed, which is not prayed for by the petition. But even if, under the prayer for general relief, we were willing to allow the plaintiff the only thing he is entitled to under the pleadings, to wit, the restoration of his negroes, the evidence and circumstances of this case do not enable us to do it. Several of the slaves have died, and the record does not inform us how many, nor what are their names. Moreover, the surviving negroes being beyond the territorial jurisdiction of our courts, the judgment which we might render, while it would be inoperative and unavailing to the plaintiff, might be a bar to his action in damages against Johnson, should he find it his in-

Robinson, Syndic, v. Shelton and others.

terest to resort to such a remedy. The only judgment that we can render in the case, as it stands before us, is one of nonsuit.

The appellant, in his points, has drawn our attention to a bill of exceptions which he took to the refusal of the judge to allow him to file an amended petition long after the issue was joined, and after the case had been set for trial. The object of the amendment was to change the claim for the price of the negroes, into an action for damages sustained by reason of the defendant's failing to give up the slaves to the petitioner's agent according to his agreement. The judge was clearly right. The proposed amendment manifestly changed the ground upon which the suit had been brought. Code of Prac. art. 419. 5 Mart. N. S. 69. Another supplemental petition praying for a trial by jury was also rightfully excluded. It came too late, after the cause had been set for trial. Code of Prac. arts. 494, 495.

It is, therefore, ordered that the judgment of the District Court be avoided and reversed; and that ours be for the defendant as in case of nonsuit, with costs in both courts.

I. W. Smith, for the appellant.

Chinn, for the defendant.

HENRY E. ROBINSON, Syndic, v. LEWIS NEVILLE SHELTON
and others.

Where notes given for the price of property, sold by one in insolvent circumstances for the purpose of giving an undue preference to certain creditors, have, in the ordinary course of trade, come into the possession of third parties, without notice of the nullity of the sale, the latter will be protected.

The authority given by law to the Cashiers of banks to execute acts of pledge, confers on those officers only the powers of Notary Publics in relation to those contracts; and none of the forms essential to the contract can be dispensed with.

It is essential to the validity of a pledge, as to third persons, that notes or other obligations payable to bearer or order, which form the subject of the pledge, should be endorsed by the payee or pledgor. C. C. 3128.

An action to rescind a contract of sale or pledge made by an insolvent, on the ground of its having been executed with intent to give a preference to certain creditors, is prescribed by one year. C. C. 1982.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. This is a revocatory action instituted by the syndic of the creditors of Samuel Chapman, to annul several contracts of sale of various tracts of land, alleged to have been made in fraud of the creditors by the insolvent, previous to his surrender. Some of these sales were made to Adolphus Follin, and others to Shelton. It is alleged that the notes given by the purchasers were fraudulently handed over to several creditors of Chapman, with the view of giving them undue preferences over other creditors of the insolvent, and that the Atchafalaya Bank, the Bank of Orleans, Edmondston & Co. and John S. Turner, had thus illegally received the notes. They, together with the purchasers, were all made parties.

The Atchafalaya Bank answered by a general denial, and a plea of prescription.

Shelton, in his answer, admits the contract, and that he executed the notes set forth in the petition, and he joins in the prayer of the petition that the notes may be given up, and consents that the contracts may be cancelled. In answer to interrogatories, he admits his knowledge of the failing circumstances of Chapman, and that the sale was made to secure Edmondston & Co. of Charleston, to whom Chapman was indebted, and that the notes were to be given up, and the land to be re-conveyed.

The Bank of Orleans answered by a general denial.

Turner answered that the note which he holds was given to him by Chapman as security for endorsements made for him by the respondent, that he has paid, or is liable to pay said endorsements, and avers his right to retain the note until refunded.

The assignees of Edmondston & Co., who were made parties, answer by a general denial; and they further aver that if the plaintiff ever had any right to the notes, it is prescribed by the lapse of one year.

There was a judgment annulling the sale to Follin, but in favor of Shelton and the other defendants, holders of the notes. The syndic has appealed. There is no appeal from the judgment so far as it concerns the sale to Follin; and the questions which the case presents relate to the validity of the sale to Shelton, and

the right of the other parties to retain the notes given for the price.

Shelton, in answer to interrogatories, admits the simulation in the sale to him, and that the land was, by an understanding between the parties, to be re-conveyed, and that it was intended for the benefit of Edmondston & Co., but without their authority. He cannot tell at what time they were informed of the transaction or received the notes. He knew the insolvent situation of Chapman.

The insolvency is clearly established, and we have no doubt of the fraudulent character of the sale to Shelton, as well as of that to Follin. The evidence in the record establishes it to our satisfaction; and the only question which presents the least difficulty, is in relation to the holders of the notes.

The defendants do not aver that they took the notes as endorsees in the ordinary course of business, but that they hold them in pledge, or as collateral security for debts due by Chapman, the insolvent. If, in the ordinary course of trade, they had passed, the holders, without notice of the nullity of the sale, would have been entitled to protection. But the plea pre-supposes that the notes still belong to Chapman, and the inquiry is, whether the defendants have furnished sufficient evidence of a contract of pledge, to conclude the creditors of Chapman represented by the syndic.

The acts of pledge in favor of the Atchafalaya Bank, by Chapman, were executed before the Cashier. The notes pledged are described, and the debt to be secured set forth rather loosely, but perhaps with sufficient certainty. The authority given by law to the Cashiers of banks to execute acts of pledge, does not extend further than to give those officers, in relation to that kind of contract, the powers of a Notary Public, and none of the essential forms can be dispensed with. It is essential to the validity of a pledge, as to third persons, that it should appear that the note, or other obligation payable to bearer or order, which forms the object of the contract of pledge, was endorsed by the payee or pledgor. This does not appear to have been done, nor is it shown that the notes were put and remained in possession of the pledgees. Civ. Code, arts. 3126 to 3129. The alleged pledge to the Bank

of Orleans is still more defective. It consists of a letter addressed by Chapman to the Cashier, enclosing the note, and stating that he pledges it to the Bank as collateral security for the acceptance of two drafts drawn on Edmondston & Co., without stating their amount, and without any evidence of the assent of the Bank at the time. Nor is there any sufficient evidence of a valid pledge in relation to any of the notes, and we cannot give effect to such informal transactions to the prejudice of the creditors of Chapman.

The plea of prescription cannot avail the defendants. If the only ground of nullity of the sales and pledges of the notes, had been the preference attempted to be given by Chapman to some of his creditors, the action could not have been brought after one year from the date of such contracts. But other grounds of nullity and fraud are alleged; and it is enough that no contract of pledge has been shown, legal in form, to conclude the creditors of Chapman. See 4 Mart. N. S. 632. 14 La. 308.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed; and proceeding to render such judgment as ought, in our opinion, to have been given below, it is further ordered and decreed that the contracts of sale set forth in the petition be rescinded and annulled, that the notes set forth in the petition be given up by the defendants to be cancelled, and that the costs of both courts be paid by the defendants.

Cohen and I. W. Smith, for the appellant.

Strawbridge, Hoffman, and *L. Pierce*, contra.

CHARLES MONROSE v. HIS CREDITORS.

Under the Code of 1808, book 3, title 19, article 77, the vendor's privilege was postponed to the law charges in general. By the new Code, the vendor is paid out of the proceeds of the thing sold, before other privileged claims, except the charges for affixing seals, for making inventories, and others necessary to procure the sale of the thing. C. C. 3234.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.
BULLARD, J. The syndic having filed his tableau of distribu-

tion, oppositions were made to it by several creditors ; and the present appeal is prosecuted by the syndic, and Janin, one of the creditors, having a vendor's privilege on an immoveable.

I. Janin, the vendor, was put down on the tableau as entitled to the proceeds of the sale of the property upon which he had a privilege, after deducting the expense of side walks and pavement, his proportion of the expense of public notices, the auctioneer's and syndic's commissions, charges for the auctioneer's stall (*droits de Bourse*,) and for a plat by Trastour. This was opposed by several creditors, on the ground that the vendor's privilege must yield to that for law charges in general.

We are of opinion that the court erred in sustaining this opposition. It is true that, under the provisions of the old Code, this court held that the vendor's privilege should be postponed to the law charges in general. See 5 Mart. 478. But the Code appears to have been amended in this particular. The new Code provides that the vendor, undertaker, or workmen and material men, shall be paid from the price of the object affected in their favor, in preference to other privileged debts of the debtor, even funeral charges; except the charges for affixing seals, making inventories, and *others which may have been necessary to procure the sale of the thing*. Article 3234. The construction given by the Parish Court to this article, would render the last clause without any effect, and give to all the charges of administration by the syndic, even those not necessary for the sale of the thing, a preference over the vendor. We are bound, if possible, to give effect to every clause of a statute. The vendor had a right to rescind the sale if the price was not paid, but having preferred to permit the property to be sold by the syndic, he became bound to pay the commissions of the syndic, who administered partly for his benefit, and only such other charges as were necessary to effect a sale of the thing.

II. The tableau allowed the wife of the insolvent the proceeds of a lot and a slave, after deducting her proportion of the charges. The wife has not appealed from the judgment reforming the tableau as to her claim.

III. None of the parties before the court have any interest in contesting the Notary's fees due in relation to the respite.

Gorman v. Berghans.

It is therefore ordered and decreed, that the judgment of the Parish Court sustaining the opposition to the tableau, so far as it relates to the vendor's privilege claimed by Louis Janin, be reversed, and that the opposition be dismissed, and the claim reinstated as it originally stood ; and that in other respects the judgment be affirmed, and the tableau homologated. The costs of the appeal to be borne by the appellees.

Dufour, for the appellants.

C. Janin, contra.

THOMAS H. GORMAN v. SIDNEY E. BERGHANS.

The authorization required to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than her own allegations, or those of her counsel.

Unless specially empowered by the husband, an attorney at law cannot authorize the wife of his client to do any act for which the authorization of the husband is required.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

This case was submitted without argument, by *Eyma*, for the plaintiff, and *Greiner*, for the appellant.

MORPHY, J. Two appeals have been taken in this case, and dismissed, on the ground that the appellant, who is a married woman, was not authorized and assisted by her husband in the proceedings. See 1 Robinson, 230, 468. When the last appeal was brought up, we said that the authorization of the husband, who resides out of the state, did not otherwise appear than by its being stated in the petition of appeal that she was by him assisted, which assistance or authorization should, we thought, be proved *aliunde*. The present record exhibits no better evidence of the husband's authorization than the former one. We find in it a paper which is called an authorization. It is a petition presented to the court below by the appellant's counsel, in the name of her husband, in which he is made to state that, inasmuch as a judgment has been rendered against his wife from which she is desirous to appeal, he comes into court, makes himself a party,

Petit and wife v. Grandmont.

and authorizes his wife to take an appeal, and assists her in the prosecution of the same, &c. We cannot acknowledge in an attorney at law, the right to assist and authorize the wife of his client to do any act for which the authorization of her husband is required by law, unless he has a special power to that effect from his client. The Civil Code, article 129, provides, that "if the husband be under interdiction, or absent, the judge may, when satisfied of the fact, authorize the wife to sue or be sued, or to make contracts." We find in the record no authority emanating either from the appellant's husband, or from the court below.

Appeal dismissed.

GILBERT HILAIRE GRENIER PETIT and wife v. HENRY R. GRAND-MONT.

An act of sale stipulated that the notes given for the price were to remain with the Notary, until a mortgage existing on the property should be cancelled. Plaintiffs obtained an order of seizure and sale, without having produced any evidence of the cancelling of the mortgage. On an appeal by the defendant, and assignment of the want of evidence of the cancelling as error apparent on the face of the record, plaintiffs offered a certificate of the Recorder of Mortgages to show that the mortgage had been cancelled. *Held*, that the cancelling not having been alleged or proved in the inferior court, no evidence could be offered to prove it on the appeal.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. The defendant is appellant from a judgment directing the issue of an order of seizure and sale against certain slaves which he purchased from the plaintiffs, and he assigns as an error apparent on the face of the record, that the bill of sale contains an express stipulation that the note, on which the order of seizure and sale was obtained, should remain in the possession of the Notary before whom the sale was made, until a mortgage which bore upon those slaves should be raised, and that there is no evidence of its having been so raised; that the plaintiffs had, therefore, no right to take the defendant's note from the custody of the Notary with whom it had been deposited; and that until the mortgage should be cancelled, they could not make any demand of the

Kennedy and wife v. Downey.

amount of the note, nor claim any order of seizure and sale thereon. The appellees endeavored to show in this court, that the mortgage had been raised, by the production of the certificate of the Recorder of Mortgages to that effect; but as this piece of evidence came directly before us from the pocket of their attorney, and the raising had not been alleged below, we cannot attend to it.

It is, therefore, ordered that the judgment be reversed, and the order of seizure and sale quashed; the plaintiffs and appellees paying the costs in both courts.

Castera, for the plaintiffs.

D. Seghers, for the appellant.

JOSEPH M. KENNEDY and wife v. RICHARD T. DOWNEY.

Under the act of 10th March, 1838, sect. 4, the Presiding Judge of the City Court of New Orleans has, within the city, exclusively of justices of the peace, or of the associate justices of that court, original jurisdiction of all actions, for whatever amount, by landlords against their tenants for the possession of real property.

Art. 2693 of the Civil Code, authorizes justices of the peace, out of the city of New Orleans, to order the expulsion of tenants, whatever may be the value of the lease.

APPEAL from the City Court of New Orleans, *Cooley, J.*

This case was submitted, without argument, by *T. M. Kennedy*, for the plaintiffs, and *G. B. Duncan*, for the appellant.

MARTIN, J. The defendant is appellant from a judgment obtained by the plaintiffs, his lessors, for the possession of the leased premises, and by which he is ordered to be expelled therefrom.

The possession was claimed on the ground of arrearages of rent unpaid. The defendant filed an exception disclaiming the jurisdiction of the court, on the ground of the lease being of greater value than one thousand dollars, the *maximum* of the court's jurisdiction; and he denied that any ground of action was stated in the petition. It does not appear to us that the court erred. By an act of the legislature passed in 1838, (see *Bullard & Curry's Digest*, page 227, sec. 81,) it is provided that, "in all actions hereafter instituted by landlords against tenants for the possession of

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real property, the Presiding Judge shall have, exclusively of justices of the peace and associate judges of the City Court, original jurisdiction," &c. This act certainly authorizes the action of the Presiding Judge of the City Court, whatever may be the value of the lease, for it contains no limitation. Indeed, before its passage, the Civil Code, art. 2683, authorized justices of the peace to order the expulsion of tenants without any distinction as to the value of the leases, in the same manner as justices of the peace were authorized by English statutes to act in cases of forcible entry and detainer.

The case was clearly within the jurisdiction of the court; and the plaintiffs established their claim on the merits.

Judgment affirmed.

GEORGE BEDFORD and another v. WILLIAM SAUNDERS.

No proceedings can be had in an inferior court, in relation to the subject matter of a case pending in the Supreme Court, until the expiration of three judicial days after judgment has been pronounced by the latter, within which time a re-hearing may be granted, and the judgment amended, or entirely changed.

An attachment having been levied on the property of an absconding debtor, certain creditors, on the same day, prayed for a forced surrender of his property, and obtained an order for a meeting of creditors and a stay of proceedings. The proceedings for a forced surrender having been set aside on appeal, on account of the insufficiency of the petition, other creditors, not parties to the proceedings for a surrender, procured an attachment from the lower court on the day on which the judgment was pronounced by the appellate tribunal, which was levied on the property of the debtor. The property seized under the first attachment proving insufficient, the creditors who sued it out, caused a *fi fa.* to be issued on the judgment which they had in the meantime obtained, and seized the property, which had been attached on the day on which judgment was pronounced on the appeal. *Held*, that the seizure under the *fi fa.* was good, and that the second attachment, having been issued before the expiration of three judicial days from that on which the judgment was pronounced, was null.

APPEAL from the District Court of the First District, Buchanan, J.

Micou, for the plaintiffs, cited Code Pract. art. 911. *Love v. Dixon*, 8 Mart. N. S. 440. *Curtis v. Curtis*, 4 La. 325.

Bedford and another v. Saunders.

Durant, for the appellants.

GARLAND, J. This case arises out of that of *Shakespeare et al. v. Saunders*, reported in 19 La. 97.* The judgment of this court in that case, was pronounced on the 28th of June last. On the same day, Blakesly and Clark, each took out an attachment against Saunders, the absconding debtor, and on the next day Turner took out a similar process, all of which were levied on certain lots in the parish of Jefferson. The plaintiffs, after the dismissal of the suit of *Shakespeare et al. v. Saunders*, went on with the attachment they had originally sued out, obtained a judgment, had the property attached sold, and it being insufficient to satisfy their judgment, they issued an execution, which was levied on the same lots attached by Turner, Blakesly and Clark, and they were sold under it to the plaintiffs. The latter then took a rule on the sheriff and attaching creditors, to show cause why the sheriff should not deliver to them an act of sale for the property, on their paying the costs of the execution and sale, and giving Saunders a credit upon the execution for the balance of the proceeds.

In answer to this rule, the defendants alleged that their attachments had priority over the seizure under the execution, they having been levied several months previous, although no judgments had been rendered in their cases. To this, the plaintiffs respond that the attachments are of no validity, as the proceedings were premature, the judgment of this tribunal setting aside the proceedings for a forced surrender in the case of *Shakespeare et al.*

* In the case of *Shakespeare et al. v. Saunders*, the plaintiffs, creditors of Saunders, had applied to the District Court of the First District for an order for a forced surrender of the property of the defendant, on the allegation that he had absconded from the State, taking with him a large part of his property for the purpose of defrauding his creditors. The property was sequestered, and a meeting of the creditors and a stay of proceedings ordered. Bedford and Beck, also creditors of Saunders, and the plaintiffs in the present case, who had previously, but on the same day, obtained an attachment against his property, and caused it to be levied before the writ of sequestration was executed, opposed the homologation of the proceedings of the creditors, on the ground that neither the petition nor affidavit filed by Shakespeare and others, alleged that Saunders was a merchant or trader. This opposition was overruled in the District Court; but the Supreme Court, considering the omission fatal, sustained the opposition, and dismissed the proceedings for a forced surrender. See 19 La. 97.

v. *Saunders*, not having become final by the expiration of three judicial days, every creditor being enjoined from taking any proceeding against the property of Saunders, until the expiration of the legal delays; and that the defendants having violated the order of the court arresting all proceedings against Saunders during the pendency of the suit of Shakespeare and others against him, cannot thereby obtain any preference or lien over a seizing creditor. The defendants show that they were not parties to the suit of *Shakespeare et al. v. Saunders*, that they did not attend the meeting of creditors, and contend that those proceedings in no way affect their rights.

The District Court made the rule absolute, and the defendants, Blakesly, Turner, and Clark have appealed.

We are of opinion that the judge did not err. The Code of Practice, art. 911, declares that the judgments of this court are not final until the expiration of three judicial days. Within that time they are within the control of the court; a re-hearing may be granted, or the judgment may be amended, or entirely changed, if the law or the facts of the case have been misunderstood or misapplied, or injustice has been done to either party. In 8 Mart. N. S. 440, it was held that no proceedings could be had in an inferior court, in relation to the same subject matter, whilst the case was pending in this court, even after judgment, until the expiration of three judicial days, which doctrine was confirmed in 3 La. 324. According to these decisions, neither the plaintiffs in this rule, nor Shakespeare and his co-suitors, could have taken any step against the property of Saunders until the expiration of three judicial days. It is, therefore, not just that the defendants, should, because they chose to stand by, obtain an advantage in a contest which, according to the doctrine they contend for, would benefit them however it might be decided. Had Shakespeare succeeded in his suit for a forced surrender, the defendants would have come in as creditors on the tableau of distribution, and have obtained their share of the property of Saunders; but as he did not, they now wish to step in, about the close of the contest between the plaintiffs and Shakespeare and others whilst their hands were tied, seize upon the whole matter in litigation, and thus obtain a preference over all the litigants. This is an attempt to real-

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ize the fable of the bear and the tiger, who having hunted a stag in company, disputed about the division of the spoils, and fought until each was so exhausted as to be unable to move, when the fox, who was in ambush watching the contest, came in and took away all that was most desirable in the prize.

Judgment affirmed.

JEAN MATERRE and another v. SÉVERIN LATAPIE.

APPEAL from the Commercial Court of New Orleans, *Watts, J. SIMON, J.* The plaintiffs sue for the recovery of the amount of an account for goods and merchandize sold by the firm of J. Materre & Co. to the defendant, who, in his answer, denies being in any manner indebted to the firm, alleging that he never had any transaction with it. He further pleads that he kept an open account with Materre, and purchased goods from him, because Materre, being his debtor, could not settle with him in any other way. He adds that he never knew of the existence of the firm of J. Materre & Co., until his transactions with Materre alone had ceased. There was judgment below in favor of the defendant, and the plaintiffs have appealed.

The case appears to have been tried below on the question, whether the defendant knew or not that he was dealing with Materre & Co., and not with Materre alone; and the defendant has attempted to show that the latter was indebted to him in a sum of money larger than the amount claimed in the petition. We have looked in vain in the record for any evidence that the defendant ever purchased the articles, the price of which is claimed by the plaintiffs. Before trying any collateral question presented by the pleadings, it is clear that the plaintiffs should have first established their demand. We have not been able to discover in the answer any admission which would dispense with the production of the proof required, and we think they were properly nonsuited.

It is, therefore, ordered that the judgment of the Commercial Court be affirmed with costs, but to have no further effect than one of nonsuit.

Jourdain, for the use of &c. v. Boissière.

C. Janin, for the appellants. No counsel appeared for the defendant.

MATILDA JOURDAIN, for the use of Ann Eliza Baker v. ISAAC BOISSIÈRE.

APPEAL from the District Court of the First District, *Buchanan*, J.

Sterrett, for the plaintiff.

Bodin, for the appellant.

MORPHY, J. This is a redhibitory action in which the petitioner claims four hundred dollars, the price of a negro woman sold to her by the defendant, under a warranty against all redhibitory vices and maladies, except the vice of running away. It is alleged that, from the moment of the purchase, the slave has been constantly suffering from various diseases, but more particularly from ulcers in her legs and knees, which have rendered her perfectly useless, and that this malady existed previous to the sale; that for drugs and medical attendance the petitioner has expended \$125, and has, finally, been compelled to return her to Boissière, who refuses to rescind the sale, and refund the purchase money, together with the \$125 expended on account of the slave. The general issue was pleaded. There was a judgment below annulling the sale, and allowing the plaintiff \$450. The defendant has appealed.

Two physicians, one of whom had the girl under treatment for several months while she was in plaintiff's possession, have declared that she was unsound, having ulcers on her left knee which must have existed for a long time, and which, in their opinion, cannot be radically cured; that even if the ulcers were healed, they would, from the nature of the disease, break out again, and that she could never have the same use of the sore leg as of the other. Two other witnesses have testified that, in consequence of this malady, the girl was unable to work at the plaintiff's house.

On the other hand, a physician has testified that the defendant

called upon him to examine the girl's knee, telling him that he had sold her, and had a difficulty about her ; that he saw that there had been a sore on her left knee, but that she appeared to use her limb freely ; that she was perfectly well at that time, and was able to work, but that he has never seen her since. From a certificate of this physician, which was given in evidence, it appears that this examination of the girl's knee took place eighteen months before the trial below. The broker who sold the girl to the plaintiff, also declares that he has seen her since she was returned to the defendant, that she is perfectly cured, and that there is nothing but a small scar on her knee. He adds that he has not seen her for a long time. This testimony does not absolutely conflict with that adduced by the plaintiff. To destroy the effect of the latter, the defendant should have proved by the physician who attended on the girl when she was returned to him, that she was radically cured, and that her ulcers had not broken out since she was examined by the physician who gave the certificate produced in court eighteen months after its date. This he could easily have done. It was not enough to show that, at a particular and distant time, her knee appeared to be cured to a physician who had not seen the ulcers, and had no opportunity of knowing the nature of her disease or of judging of its curableness. Moreover, the defendant has not shown that after the pretended cure, he ever offered to return the slave to the plaintiff. Upon the whole, the evidence is not such as to make it our duty to reverse the judgment appealed from.

The declaration of the broker, at the time of the sale, that the girl had a wound on her knee, and had hurt herself in scrubbing floors, did not apprise the plaintiff that she had a disease of a character not to be radically cured.

Judgment affirmed.

NICHOLAS NOEL DESTREHAN v. MANUEL JOSEPH GARCIA, Sheriff.

To obtain a judgment against a sheriff with damages for his failure to return an order of seizure and sale on or before the return day, as required by the act of 7th April, 1826, sect. 7, it must be shown that a writ of seizure and sale was actually placed in his hands, and that he failed to return it on the return day mentioned therein. A statement in the judgment appealed from, that a writ was issued, is not sufficient. Such statements are not evidence.

APPEAL from the District Court of the First District, Buchanan, J.

MARTIN, J. The defendant, sheriff of the parish of Jefferson, is appellant from a judgment by which the plaintiff has recovered the amount of a claim, for which he had placed an order of seizure and sale in the hands of the defendant in his official capacity, with damages, under the 17th section of the act of the 7th of April, 1826, amending the Code of Practice, &c., on the ground that the latter had not returned the writ in due time. This section provides that, "it shall be the duty of each of the sheriffs of the different parishes in this State to return all writs directed to him, into the clerk's office from which they issued, on or before the return day mentioned therein." In order to justify the heavy judgment given against the sheriff, the record should show that a writ issuing from a clerk's office had been placed in the defendant's hands, and that he failed to return it on the return day mentioned therein. The record shows that the judge of the parish of Jefferson granted the plaintiff an order directing a writ of seizure and sale to be issued, but there is no evidence that such a writ was ever issued, unless we take for evidence that which the judge *a quo* mentions in his judgment. This has never been the practice of this court. From reading the record we have received the impression that the *fiat* of the parish judge for an order of seizure and sale, was considered and acted upon by the defendant as an order of seizure and sale.

If the plaintiff could contend that this *fiat* of the judge was equivalent to an order of seizure and sale, and ought to have been returned in like manner, he should show that this *fiat* contained

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what ought to have been stated in the writ from the clerk's office, to wit, the mention of the day on which it was to be returned.

It is therefore ordered that the judgment be annulled, and that ours be for the defendant as in case of nonsuit, with costs in both courts.

Larue, for the plaintiff.

Canon, for the appellant.

SUCCESSION OF BERNARD FOX—PATRICK FOX, Appellant.

Where a remunerative donation exceeds the disposable portion, the donee or legatee is bound to prove the value of his services. If proved to be equal to or greater than the bequest, no reduction can be made; otherwise, it must be reduced to the estimated value of the services. C. C. 1500, 1512. But where such donation does not exceed the disposable portion, the declaration of the testator as to the services and their value, will be conclusive on the heirs, and no proof will be required from the legatee. In the latter case, the remunerative disposition must be viewed as an ordinary bequest, and the services as the motive or inducement for making it. One who avers that a remunerative legacy exceeds the disposable portion, must show it. Until this be established, the donee or legatee is not bound to prove the value of his services.

APPEAL from the Court of Probates of New Orleans, *Bermudez*, J.

MORPHY, J. The petitioner, Patrick Fox, seeks to recover from the estate of his brother, Bernard Fox, three thousand dollars, the amount of a remunerative donation made in his favor by the deceased in his last will and testament, in consideration of long and faithful services rendered to him. The answer of the executrix admits that such a remunerative disposition is contained in the last will of the deceased, but avers that the petitioner is not entitled to recover, because he is not a creditor of the estate, not having been in the employment of, nor having worked for the deceased, except for a short time, for which he was fully paid by having his board, lodging, and washing at the house of the deceased, and receiving from him various sums of money from time to time, all of which amounted to as much if not to more than

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the value of the labor he performed. It alleges that if the bequest is to be sustained, it must be reduced to the disposable portion which it exceeds, the deceased having left three children living at the time of his death, and his wife having since had another, with which she was then pregnant; that should the petitioner's demand be allowed in whole or in part, the sum of \$2000 is pleaded in compensation or reconvention, being the amount of a note of hand due to the deceased by the plaintiff and one Reilly *in solido*, and secured by a deed of pledge. There was a judgment below against the petitioner, from which he has appealed.

We agree with the judge *a quo*, that, although the evidence shows generally that the plaintiff rendered valuable services to his brother, and materially aided him in acquiring his fortune, yet, from its vagueness and uncertainty as to the time when he worked with or for the deceased, and as to the amount of certain advances made by the latter to the plaintiff at different times, it is difficult to determine what particular amount or balance is due by the estate. It is urged by the appellant, Patrick Fox, that as his services have been acknowledged by the testator, and a value set upon them, it was not necessary for him to prove them; or, at least, that such strict proof should not be required as in the case of an ordinary claim against a succession. A distinction should, we think, be made. If a remunerative donation exceed the disposable portion, the donee or legatee is bound to prove the value of his services, and the legacy will be reduced if he do not show that his services are worth the amount bequeathed to him. On the other hand, if the value of his services be equal to, or greater than the bequest, no reduction can be made. Civ. Code, 1500, 1512. But whenever the remunerative disposition does not exceed the disposable portion, the declaration of the testator as to the services rendered and their value, should be conclusive on the heirs, and no proof should be required from the legatee. 5 Toul-lier, 190. In the latter case, the remunerative disposition should be viewed as an ordinary bequest, and the services mentioned by the testator as his motive, or inducement for making it. The record leaves us entirely uninformed as to the property left by the deceased. As the executrix has averred, in her answer, that the legacy exceeded the disposable portion, and as the petitioner was not bound to prove his services unless such was the fact, it be-

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hooved the executrix to show it. But as it may have been doubtful on whom it was incumbent to adduce the proof, and, as in deciding this case without it, injustice may be done, we have thought it best to remand it for a new trial.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, and that this case be remanded for further proceedings; the costs of this appeal to be borne by the executrix and appellee.

* This case was submitted, without argument, by *Preston*, for the appellant, and *J. Mitchell*, for the executrix.

WILLIAM W. FRAZIER and others, Assignees, v. THE NEW ORLEANS GAS LIGHT AND BANKING COMPANY.

A bank employing its regularly appointed notary to protest a note deposited with it for collection, will not be liable for his official misconduct or failure to give notice to the endorsers.

An agreement between two banks, established in different cities, and acting as agents for each other, that "prompt advice shall be given as well of the acceptance and payment of all remittances, as of protests for non-payment or non-acceptance," will not be considered as contemplating such speedy advice as to enable the party transmitting paper for collection, to give notice of protest to endorsers after receiving advice from the party charged with the collection.

APPEAL from the Commercial Court of New Orleans, *Watts, J. T. Slidell*, for the plaintiffs.

G. Strawbridge, for the appellant.

BULLARD, J. The plaintiffs sue as assignees of the Commercial and Rail Road Bank of Vicksburg, for a balance alleged to be due by the New Orleans Gas Light and Banking Company of \$7426 47.

The defendants, after an exception which need not be further noticed, answered to the merits, that the Bank of Vicksburg is indebted to them in the sum of \$6250, the amount of a promissory note drawn by one Anderson, and endorsed by several persons, which note was forwarded to that Bank, in pursuance of an agreement between the two institutions, for collection, which they failed

to make, or properly to protest the same, whereby the defendants sustained a loss to that amount; and they pray judgment therefor, with interest.

The two Banks appear to have acted, by agreement, each as the agent of the other, in the collection of promissory notes and bills of exchange transmitted for that purpose.

The note in question was forwarded by the defendants to the Vicksburg Bank, and at maturity was handed to a notary public for protest, and was by him protested for non-payment, and notice given to the endorsers, with the exception of H. C. Cammack & Co., who are alleged to be endorsers; and it is in consequence of this omission that the defendants claim a credit for the amount of the note, they having failed to recover of the last, and, as is alleged, the only solvent endorsers.

It appears that when the note was remitted to Vicksburg, the original was covered with endorsements, and that a copy of the note was attached to the original, with a copy of the endorsements on the back of it. At the bottom of this list on the copy, was the name of H. C. Cammack & Co., with these words or others over it, "Original attached hereto." There was no name after that of Cammack & Co., not even the endorsement of the Bank for collection. There was also attached to the original note a memorandum showing the names and residences of all the endorsers, except Cammack & Co. This was intended probably as a direction to the notary how to direct his notices of protest. The original has been exhibited to us in the argument, and we cannot avoid saying, that the manner in which the endorsement of Cammack & Co. was given, and the omission of their name on the memorandum of endorsers, were calculated to mislead the notary. Endorsements of this kind, by what is called an *allonge*, are rare in practice. The original note was somewhat torn, and the notary may very honestly have supposed that the copy was given instead of pasting or otherwise fastening together the original, and that Cammack merely attested the copy. But the promissory note in question was made payable at a Bank in Vicksburg, and we held in the case of *Hyde and Goodrich v. The Planters Bank of Mississippi*, which was similar to this, that a Bank, employing their regularly appointed notary to protest a note

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deposited with them for collection, is not liable for the official misconduct or failure of the notary to give notice to the endorsers. 17 La. 560. The two cases in this respect cannot be distinguished.

But it is contended, on the part of the defendants, that independently of the neglect of the notary, the defendants are entitled to damages, on the ground that the two Banks were bound by agreement to give prompt notice to each other of the payment or dishonor of paper forwarded for collection, and that if the Gas Bank had had timely advice of the protest of the note, they might themselves have given due and reasonable notice to Cammack & Co., and have thereby secured the amount of the note.

To this it has been answered, and we think satisfactorily, that the Banks do not appear practically to have been so exact and strict in their correspondence; that the right to recover is not put by the pleadings upon that footing; and that the note, being payable at Vicksburg, and all the endorsers mentioned in the memorandum residing in Mississippi, it could not be supposed to be the wish of the Gas Bank that it should be sent back to New Orleans to be put in suit, but rather that it should remain at the place where it was payable, for a reasonable time, in order to see whether any of the parties would take it up, and if not, to be put in suit in the state where most, if not all of the parties, resided. The third article of the agreement between the two Banks provides that prompt advice shall be given as well of the acceptance and payment of all remittances, as of protests for non-payment or non-acceptance. It would be a strained construction of this agreement to suppose that the parties contemplated such speedy advice, as to enable the party transmitting paper for collection to give notice of protest to endorsers after such advice had been received from the party charged with the collection.

Judgment affirmed.

GOODMAN S. GOODMAN and others v. A. BRANDICE JAMES.

Where a party wishes to obtain an execution on a judgment rendered in another State, he must produce a record attested in the mode pointed out in that part of the Code of Practice regulating executory process. A transcript certified by the clerk of the court, sealed with the seal of the court, and authenticated by the signature of the Governor and the great seal of the State, is insufficient. It should have been accompanied by a certificate from the judge, chief justice, or presiding magistrate, declaring that the attestation of the clerk was in due form.

APPEAL from the Commercial Court of New Orleans, *Maurian*, J. presiding.

MARTIN, J. The defendant is appellant from an order allowing an execution on a transcript of a judgment obtained in the State of Mississippi, and his counsel urges that the judge below erred in ordering executory process to be issued, the transcript not having been certified in the manner required by the article 752 of the Code of Practice, which requires a certificate in the form prescribed by the law of Congress. This article declares that "judgments rendered in the different courts of the United States shall import full proof in the courts of this State, if the copy which is offered be certified by the clerk of the court in which they are rendered, be sealed with its seal, if there be one, and clothed with the certificate of the judge, chief justice, or magistrate who presides in the court, as the case may be, declaring that the attestation is made in due form."

In the present case, the transcript is attested by the seal of the court in which it was rendered, and the signature of its clerk, which is authenticated by that of the Governor and the great seal of the State of Mississippi.* The counsel for the plaintiffs and ap-

* The certificates appended to the record in this case, are in the following words :

"State of Mississippi, Hinds County. In testimony that the preceding four pages contain a copy of the record of the case therein stated as the same remains in the office of said court, I, Amos B. Johnston, clerk thereof, hereunto put my name and the seal of said court, the 4th day of August, A. D. 1841.

[SEAL.]

"A. B. JOHNSTON, Clerk."

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pellees has contended that before the provisions of the law of Congress and the Code of Practice, the record of a judgment rendered in another State, attested by its seal, and the signature of its clerk, authenticated by that of the Governor and the great seal of the State, made full proof of its contents, and that neither the act of Congress nor any law of this State necessarily require, though they admit, any other mode of proof. He has relied on the case of *Ellmore v. Mills*, 1 Haywood, 359. The court *arguendo* said, "that the act of Congress is only affirmative, and does not abolish such modes of authentication as were used before it passed." This case is not exactly in point. The instrument offered in evidence made no part of the record of a court. It was the *registered* copy of a deed disposing of certain slaves. The registry of deeds is not an act of the court, though the ordering a deed to be registered may be. The act of Congress and our Code require the action of the presiding judge of the court in the attestation of its records.

We wish not to be understood as expressing any opinion in general cases as to the mode of attesting records; but we are of opinion that when a suitor seeks the immediate execution of the judgment of a court of a sister State, he should produce a record attested in the mode stated in that part of the Code of Practice which regulates executory process.

It is, therefore, ordered, that the judgment of the court discharging the rule which the defendant had obtained on the plaintiffs, to show cause why the executory process issued in this case should

"By Alexander G. McNutt, Governor of the State of Mississippi. To all who shall see these presents, Greeting: Be it known that Amos B. Johnston, whose name is subscribed to the annexed certificate, was on the 4th day of August, A. D. 1841, clerk of the Circuit Court in and for Hinds County, in the State of Mississippi; that his attestation to the annexed certificate is in due form of law, and made by the proper officer; and that full faith and credit are due to all his official acts. In testimony whereof, I have caused the great seal of the State to be hereunto affixed. Given under my hand, at the city of Jackson, this 18th day of August, A. D. 1841.

[SEAL.]

"A. G. McNUTT.

"By the Governor,

"THOMAS B. WOODWARD, Secretary of State."

 Succession of Bernard Fox—Mahoney, Appellant.

not be set aside, be reversed ; and that ours be that the rule be made absolute, with costs in both courts.*

Benjamin, for the plaintiffs.

J. Claiborne, for the appellant.

 SUCCESSION OF BERNARD FOX—OWEN MAHONEY, Appellant.

Acknowledgments by one since deceased, proved by a witness who could not be contradicted, much less convicted of perjury, though he had sworn falsely, is the weakest kind of evidence, and scarcely worthy of any belief. But where, in an action for the value of work done for the deceased, it was proved to have been performed ; and two witnesses testified to the acknowledgment of the debt by the deceased, *in extremis*, in the presence of his wife and of the magistrate who was receiving his will, either of whom might have been produced to contradict the statement if false, and no other attempt was made to rebut or discredit the testimony, the claim will be considered sufficiently proved.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

BULLARD, J. The petitioner sues to recover of the estate of Ber-

* *Benjamin*, for a re-hearing. Greenleaf, on Evidence, p. 537, § 489, declares "that the act of Congress respecting the exemplification of public office books, is not understood to exclude any other mode of exemplification which the courts may deem it proper to admit." At p. 549, § 535, speaking of the act of Congress relative to *judicial records*, he says, that "it seems to be generally agreed that the method of authentication is not exclusive of any other which the States may think proper to adopt." An exemplification under the *great seal* of the State, is of itself, a record of the greatest validity. The object of the acts of Congress was to place the records from other States of the Union on a more favored footing than those from other countries. The transcript in the present case would be admitted in any court in Europe. Article 746 of the Code of Practice provides, that executory process shall issue in favor of a creditor who has a judgment having the force of *res judicata* from a sister State. In this case, the judgment was confessed in Mississippi. Article 752 of the Code of Practice, is a mere reprint of the act of Congress. It declares that "the judgment shall import full proof," if the copy be certified in a particular way. But it does not exclude better and higher proof. If the act of Congress does not exclude the higher proof, the Code of Practice does not ; their language is the same.

Re-hearing refused.

nard Fox the sum of thirteen hundred and twenty dollars, which he alleges is due to him for his services as a laborer and drayman for two years preceding the death of Fox, according to an account annexed to his petition. After an exception touching the sufficiency of the petition, which we think was correctly overruled, the respondent answered to the merits, by denying any settlement of accounts between the deceased and the petitioner, admitting her quality of executrix, and generally denying the facts and allegations in the petition.

There was judgment for the petitioner for only a part of his demand, and he has appealed.

It is shown clearly that the petitioner was in the constant employment of the testator for two or three years before his death, engaged in digging foundations, pulling down old houses, and laboring generally. This is proved by the brother of the testator, as well as by other witnesses. The former stated that an hour or two before Bernard Fox's death, he heard him say that he owed the petitioner fourteen hundred or fifteen hundred dollars.

Charles Dimond testified that he heard Bernard Fox speak of Mahoney some time before his death, saying that Mahoney was very useful to him, and that he owed him about twelve hundred dollars. He was present at the death-bed of B. Fox when Judge Grivot was taking his will; heard him say he owed Mahoney about thirteen hundred dollars; he repeated it two or three times, and wished it to be inserted in his will, but the judge said it was an account that could be settled afterwards. Ann Fox, the executrix, was present at the time, sitting on the bed.

Murphy made a similar statement of what occurred at the time when the will was received, and corroborates the statements of other witnesses to the services of Mahoney.

This evidence was in our opinion clearly admissible, and the acknowledgment of indebtedness being proved by two witnesses and supported by strong corroborating circumstances, must be regarded as sufficient to make out the petitioner's case. It is true we have often said that the acknowledgment of a deceased person, proved by a witness who could not be contradicted, much less convicted of perjury if he swear falsely, is a very weak kind of evidence, and scarcely worthy of belief at all. But in this

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case the services are shown to have been rendered. Two witnesses swear to the acknowledgment of the testator *in extremis*, in the presence of his own wife, and of the magistrate who was receiving his last will, and who might have been produced to contradict them. No attempt was made to rebut this evidence, or to discredit the witnesses. With such evidence before us, we cannot concur with the first judge that the plaintiff is entitled to recover only a part of his demand.

The judgment of the Court of Probate is therefore reversed, and ours is, that the petitioner recover of the successor of Bernard Fox thirteen hundred dollars, with interest at five per cent from judicial demand; and the costs in both courts.

Submitted, without argument, by *Preston* for the appellant:

J. Mitchell, contra.

SUCCESSION OF MICHAEL HART—CATHARINE STEWART and
Husband, Appellants.

APPEAL from the Court of Probates for the parish of New Orleans, *Bermudez, J.*

BULLARD, J. The curator of the estate of Michael Hart presented his tableau of distribution, showing a balance in his hands to be distributed, of \$599 44, which he proposed to divide among several mortgage creditors *pro rata*. To this oppositions were filed: *first*, by the Commercial Bank, claiming under a mortgage given by the deceased to Hertzog, upon the lot, the sale of which had produced the whole amount to be distributed, in which the wife of Hart had intervened, and since the promulgation of the act of 1835 renounced her mortgage in favor of the mortgagee; and *second*, by the widow of Hart, claiming in virtue of her legal mortgage, the amount of her paraphernal property.

The court, in our opinion, did not err in overruling this last opposition. An act was exhibited showing a mortgage in favor of Hertzog, in which the wife had intervened, and the renunciation she then made, as apparently authorized by the legislature, does

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not appear to have been rescinded, but is shown as an existing contract which cannot be disregarded, and which must have its effect until annulled. She was, therefore, without capacity to contest the claims of the Commercial Bank.

It appears to be satisfactorily shown that the Commercial Bank was acting, in fact, as the agent of the widow of Hertzog, now Elizabeth Keller, the mortgagee, who was at the same time his universal legatee, and the executrix of his last will. The Court of Probates, therefore, permitted the opposition of the Commercial Bank to accrue to the benefit of the succession of Hertzog, and recognized that succession as first mortgagee. The succession of Hertzog was not before the court, and we see no necessity for subjecting that sum to administration as a part of the estate. The widow placed the note in the hands of the Bank, and the will shows that she was, for aught that appears to the contrary, entitled to it as residuary legatee.

We cannot forbear remarking that this case presents a very striking illustration of the defects of our system of administering estates, and of the enormous charges with which they are burdened. The whole estate of Hart produced \$1000, and the costs of administration amounted to \$400 56, to wit: \$46 to the Register of Wills; \$33 for the experts and notary in taking the inventory; \$125 to the attorneys of the curator; \$50 to the attorney of absent heirs; \$25 curator's commissions; and \$68 to different newspapers; with some other small charges independently of funeral expenses, in all, upwards of forty per cent upon the whole estate; of this the counsel and curator divide between them twenty per cent upon the estate. It would seem to us that a thousand dollars might have been distributed among creditors, most of whom get nothing at all, at a much cheaper rate. It is true we are not called upon in this case, to pronounce judicially upon any of these allowances; but we think it our duty to notice these frightful abuses, which, in our opinion, call loudly for legislative interference. In this case the widow of the deceased does not get one cent, while three members of the learned profession, who do not appear to have done much, were allowed \$175 out of a thousand, seventeen and a half per cent upon the estate.

The judgment of the Court of Probates is therefore avoided and

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reversed ; and it is ordered that the opposition of the Commercial Bank be sustained, and that the curator pay over to that Bank the balance in his hands for the use of Elizabeth Keller, and that the appellees pay the costs of this appeal.

Van Matre, for the appellants.

L. Janin, contra.

JOSEPH CARMENA v. PIERRE OSCAR PEROUX and others.

The plea of the general issue in an action against the acceptors of a bill of exchange, admits their signature, which is all that the plaintiff was bound to prove.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. This case was submitted without argument, by *Wray* for the plaintiff. No counsel appeared for the appellants.

MARTIN, J. The defendants are appellants from a judgment against them as acceptors of a bill of exchange, on their plea of the general issue. This plea admits their signature as acceptors, and consequently their obligation to pay the bill. This is all which the plaintiff was bound to prove.

Judgment affirmed.

THOMAS FITZWILLIAMS v. JACOB WILCOX and others.

The possession of a promissory note, payable to order, and endorsed in blank, is *prima facie* evidence of title, the property passing by delivery. No other transfer is necessary to entitle a party to avail himself, *via ordinaria*, of a mortgage given to secure its payment ; but to proceed, *via executiva*, the mortgage must be transferred by an authentic act.

APPEAL from the District Court of the First District, *Buchanan*, J.

Micou, for the plaintiff.

Josephs, and *L. Pierce*, for the appellants.

MARTIN, J. The defendants, endorsers of a note, are appellants from a judgment against them. They resisted the plaintiff's claim

Robbins and another v. Lambeth and another.

on an averment that he is without interest in the note, otherwise than so far as may be necessary to avail himself of a mortgage given to secure the payment of the note to the Exchange and Banking Company, which was transferred by the Bank to the plaintiff by a notarial act.

The plaintiff is in possession of the note, with the blank indorsements of the defendants. They do not allege that he is so without consideration, and indeed the consideration is proved; but they urge that the notarial act executed by the Bank in his favor, speaks only of the transfer of the mortgage without saying a word as to that of the note. The District Judge was of opinion, that possession of a promissory note payable to order, and indorsed in blank, is *prima facie* evidence of title. The property of such a note passes by delivery. The plaintiff needed no other transfer of the note, and his possession would have entitled him to avail himself of the mortgage; but this he could not have done, *via executiva*, without an authentic transfer of the mortgage. He, therefore, did not content himself with merely receiving the note, but required a notarial transfer of the mortgage, in order that he might not be compelled to resort to the *via ordinaria* for the purpose of having the land sold.

Judgment affirmed.

GEORGE S. ROBBINS and another v. WILLIAM M. LAMBETH and another.

The acceptance of a bill of exchange or promissory note, though after sight of an indorsement, does not admit the signature of the indorser. The acceptor looks only to the signature of the drawer, and that alone he is precluded from afterwards disputing.

Plaintiffs, indorsees of a bill of exchange, alleged to have been burnt, drew on the acceptors for the amount payable at the maturity of the original bill. On presentation of the draft, the latter told plaintiffs' agent that "there would be no difficulty about it," which led the agent to conclude that the draft would be paid. *Held*, that these words, which probably referred only to the embarrassment resulting from the loss of the bill, did not, under the circumstances, amount to an absolute acceptance of the draft, nor waive the acceptors' right to be satisfied of the genuineness of the endorsement of the original bill.

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An inconsiderate or hasty promise to accept a bill may, perhaps, be revoked, where no third person has in the meantime been affected by it.

A promise to accept a bill, if the amount exceed five hundred dollars, must be proved by at least one witness, and by other corroborating circumstances. These circumstances must be established *aliunde*, and not by the witness himself.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. This action is brought against the defendants as acceptors of a bill of exchange alleged to be drawn by Isaac Thomas, to the order of and endorsed by E. H. Flint & Co. The petition avers that the bill was destroyed by fire in April, 1841, in the city of New York, when the papers and books of the plaintiffs were consumed; that the defendants had been apprized of the fact, and promised to pay the bill or obligation, but that they now declined so to do, although security has been tendered to them in the premises. Annexed to the petition are a bond of indemnity, and a draft of Robbins, Painter & Co. on the defendants for \$2745 53, the amount of the last bill, payable the 4th of February, 1842, the period of maturity of the bill. The answer admits that the defendants did accept a draft of Isaac Thomas in favor of E. H. Flint & Co., but denies every other allegation of the petition. It further denies that any other indemnity was offered to defendants than the security of a house in New York, of whose responsibility they knew nothing, and whom, if they (the defendants) were really bound to the plaintiffs as alleged, they would not be bound to accept. There was a judgment below for the plaintiffs, from which the defendants have appealed.

No proof was offered, on the trial, of the endorsement of the payees, E. H. Flint & Co. The inferior judge was of opinion that this could be dispensed with, because the residence of Flint & Co. at Alexandria, the place where the bill was drawn, was presumptive evidence that it was endorsed before acceptance. It appears to us that this presumption, if it exists at all, is a feeble one; but even if such were the fact, it could not relieve the plaintiffs from the necessity of proving the genuineness of the endorsement of the payees. It has been held that an acceptance, though made after sight of an endorsement, does not admit the signature of the endorser, because, when he accepts, the acceptor looks only to the hand-writing of the drawer, and *that* alone he is after-

wards precluded from disputing. Bailey on Bills, 487. Starkie, 4 part. 247. 1 Term R. 654. 6 Espinasse, 43. 1 Camp. 83. But it is urged that, if not bound by their original acceptance, the defendants are liable on their promise to pay, or acceptance of, the plaintiffs' draft on them for the same amount. On this point, Stanley Milford, an agent of the plaintiffs, testifies that he called on the defendants on or about the 20th of January last, and presented to them the plaintiffs' draft; that Lambeth, one of the firm, answered "that there would be no difficulty about it;" that from this, he, the witness, concluded, and wrote to the plaintiffs that the draft would be paid when due; that on the morning of the 4th of February, he requested payment of William Thompson, whose reply was that witness had better allow the day to pass, and see if the original draft would present itself; upon which, witness delayed calling until five o'clock in the afternoon, when he saw Lambeth, who then stated that he did not see that he could pay, without consulting Thomas, the drawer of the original bill. We do not think that the words used by the defendants, under the anomalous circumstances of this case, can by implication be viewed as an absolute acceptance or promise to pay. The expression, "there will be no difficulty about it," might have related to the embarrassments created by the loss of the bill, but did not waive their right to be satisfied of the genuineness of the endorsement under which the plaintiffs pretended to have become owners of the lost bill. Words far less ambiguous, in ordinary circumstances, have been held not to bind as an acceptance. In *Powell v. Jones*, 1st Espinasse, p. 17, it was ruled that the words, "there is your bill, it is all right," did not amount to an acceptance. Words used under the surprise of a sudden and unexpected demand, ought to be construed with strictness. Here was a demand made on them before the maturity of their original acceptance, under unusual circumstances. After their first answer, the defendants may have been, and probably were, advised of the necessity of caution. Hence the desire to see if the original draft would present itself, and the ultimate reply that the bill could not be paid without consulting the drawer, Isaac Thomas. They had perhaps the right to revoke an inconsiderate and hasty promise, if their words implied a promise, no third party having been in the mean time af-

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fectured by it. Chitty on Bills, 337, 338. 4 Massachusetts Rep. 341. But it is, moreover, urged by the appellants that, if their language be construed into a promise on their part, it must be considered as an agreement to pay money, and under art. 2257 of the Civil Code must be proved by one credible witness, and other corroborating circumstances, and that such circumstances must appear *aliunde*. 8 Mart. N. S., 457. 19 L. 265. We have searched the record in vain for corroborating circumstances in support of Milford's testimony. Upon the whole, it appears to us that the plaintiffs have not made out their case.

It is, therefore, ordered that the judgment of the Commercial Court be reversed; and that there be judgment for the defendants as in case of nonsuit, with the costs in both courts.

Potts, for the plaintiffs.

W. M. Randolph, for the appellants.

THE STATE v. THE JUDGE OF THE THIRD JUDICIAL DISTRICT.

The provision of the second section of the act of 26th March, 1842, directing all judicial proceedings by individuals, against the Clinton and Port Hudson Railroad Company to be stayed, must be understood as suspending such proceedings, pending a suit by the State for the forfeiture of its charter, in order that no one creditor may gain an undue advantage over the rest. Such a temporary stay of proceedings, does not impair the obligation of contracts. It is a conservatory measure only. *Otherwise*, were the clause interpreted as directing a stay of all proceedings from the promulgation of the act for an indefinite period, upon the mere authority of the legislature.

APPLICATION for a mandamus to the Judge of the Third Judicial District, *Johnson*, J.

Roselius, Attorney General, for the State.

BULLARD, J. The Attorney General informs us that, in pursuance of an act of the legislature entitled "an act to preserve the credit of the State," approved on the 26th of March, 1842, proceedings have been commenced against the Clinton and Port Hudson Rail Road Company for a forfeiture of its charter, and a final liquidation of its affairs. He further shows that the Judge of the Third

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Judicial District, before whom the suit is pending, has declined to grant an order, authorized by an act to stay all proceedings by individuals against the Company pending such suit. He prays for a mandamus against the Judge, commanding him to grant such stay of proceedings. The Judge has given his reasons for not allowing the injunction to issue, and it is understood that those reasons are to be considered by us as if given in answer to a rule to show cause why a mandamus should not be issued; and should we consider them insufficient, that a peremptory mandamus is to be issued in the first instance.

The clause of the act which authorizes the proceeding is in the following words: "*provided further*, that from and after the passage of this act, all judicial proceedings against said Company by individuals shall be stayed." By this we understand the intention of the legislature to be a suspension of proceedings on the part of individual creditors, pending the suit for a forfeiture of the charter, in order that no one may gain any advantage over others not resulting from his contract, and that the State itself, considered as a creditor of the Company, is to come in after the decision of the case, and when a *concurso* shall be formed, for the purpose of a fair and equal distribution of the assets. Such is the case in all surrenders of property under the State laws. It is true, that in those cases the property is already given up to the creditors, and the surrender accepted by the Judge. The Judge of the district appears to give a more literal construction to the act, and regards it as liable to serious constitutional objections. He remarks, that "a judgment of forfeiture will not necessarily follow the institution of a suit for that purpose, and that the contingency which will put the affairs of the Company in liquidation, may never happen. In the meantime, the State may proceed to enforce its mortgage against the Company; the Company may sue, have judgment, execute in satisfaction, trade, and do all manner of things right or wrong, and the individual creditors of the Company are without power to move judicially, in person or by legal representative, to protect their rights, until there is a decree of forfeiture and commissioners are appointed, or until the legislature may think fit to take away the restraint which it has ordered and, by an assumption of judicial power, executed in one breath.

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This to me looks like the impairing of the obligation of contracts. I can see no substantial remedy which has been left to the individual creditors."

In answer to these objections it may be remarked, that the Judge looks rather to the literal tenor of the act than to the prayer of the petition presented by the State, which is, that all proceedings against said Company, except in behalf of the petitioner, may be stayed, in accordance with the act above referred to, *until after the final decision of the suit*, and for an injunction accordingly.

It appears to us that a temporary stay of proceedings on the part of creditors, with the view of preventing any unjust preference or advantage from being gained pending the proceeding on the part of the State to revoke the charter, does not impair the obligation of contracts. We regard it as a conservatory measure only; and if the State should proceed, in the meantime, to foreclose its mortgage to the prejudice of other creditors, it will be time to inquire whether equal justice does not require its proceedings to be stayed, in order that all the creditors may come in concurrently when the corporation shall have been dissolved, and commissioners appointed to liquidate its concerns. The last clause in the act, however, reserves to the State the right, in the meantime, to foreclose the mortgages of the stockholders according to the existing laws.

The objection made by the Judge, that the legislature has assumed judicial power in the premises, would be difficult to answer, if we were to give a literal construction to that clause of the act which declares that, from and after the passage of the act, all judicial proceedings, on the part of individual creditors, shall be stayed. But the attorney general does not put the case upon that footing. We are not asked to sanction a stay of proceedings from the promulgation of the act, indefinite in duration, upon the mere authority of the legislature. On the contrary, the State asks that the creditors of the Bank may be restrained by orders emanating from judicial authority, from proceeding to enforce their claims against the corporation, in order that every thing may be kept *in statu quo*, until the proceedings for a forfeiture of the charter shall have been finally disposed of, precisely as in cases of respite and

cessio bonorum under the laws of the State. To this extent we do not perceive that there is any constitutional objection to the proceeding.

It is therefore ordered, that a mandamus be issued commanding the Judge of the Third Judicial District to grant the stay of proceedings and injunction, as prayed for.

JOHN H. A. FROST v. JOHN H. PEARSON and another.

THE defendants are appellants from a judgment of the Commercial Court of New Orleans, *Watts, J.*, in favor of the plaintiffs for the amount of the bill sued on.

Eustis, for the plaintiff.

Maybin, for the appellants.

GARLAND, J. The plaintiff is the holder of a protested bill of exchange for \$1700, drawn upon the defendants, who reside in Boston, by E. Snelling, Jr. He alleges that the defendants are bound to pay it, it having been drawn by Snelling in virtue of, and taken by him on the faith of a letter of credit given by the defendants to Snelling, authorizing him to draw bills for any amount he might choose, which they promised to accept and pay. The plaintiff claims the amount on the further ground that Snelling was the defendants' agent in New Orleans, and that the funds given for the bill went to the use of the defendants.

The defendants deny that they are liable to pay the bill. They aver that they are not bound by the letter of credit; that it did not authorize Snelling to draw on them; that although the letter was given in the year 1838, that the members of the firm of Pearson & Co. were changed in March, 1839, and that Snelling had also formed a partnership with a person named Lewis for the transaction of business in New Orleans, and that the authority was never renewed.

The testimony shows that Snelling was brought up as a clerk, in the mercantile establishment of Pearson & Co. That in the

year 1837 they sent him to the western States as their agent, to purchase produce for them ; that at the termination of their speculations in that quarter in 1838, Snelling determined to come to New Orleans, when the defendants gave him the following letter :

Boston, Oct. 4, 1838.

MR. EPHRAIM SNELLING, JR.,

DEAR SIR :—As you are about leaving this to establish yourself in New Orleans, you are hereby authorized to value on us as you may require for any operations, and your drafts will be duly honored.

We are, respectfully,

JOHN H. PEARSON & Co.

Snelling, with this letter, established himself in New Orleans, not having, so far as we are informed, any other capital. His being in possession of this letter was publicly known, particularly among merchants from Boston, and those engaged in business with that city. The plaintiff was informed of the existence of the letter, by a person who says that he was authorized to answer for Snelling. Pearson & Co. are merchants of known capital and established credit ; and the plaintiff, knowing this, at different times, purchased bills from Snelling on them, all of which were promptly paid, until the presentment of the bill now in contest. Many other bills, drawn by Snelling and sold to other persons, were paid, until about the time when Snelling appears to have got into difficulties, when the defendants suddenly refused to honor his bills. The evidence shows that Snelling came to New Orleans at the instance of the defendants, and that they manifested great solicitude to advance his interests. They entrusted the management of all their business in this city to Snelling. Their vessels were consigned to him ; he procured or purchased cargoes for them, and drew bills to enable him to pay for them. He was known as the agent of the defendants, and credit was given him in consequence. From the general character of the authority to draw bills, it might well be supposed that they were to be drawn for the benefit of the defendants. Independent of the testimony given by the witnesses, the correspondence of the defendants

shows very clearly that Snelling was, at least, their agent, and goes very far to establish a connection in business approaching to a partnership. The letter of the defendants of the 20th of April, 1839, commenting upon the agreement made on the 4th of October, 1838, makes the authority to draw clear, and shows the relation that existed between the parties. The commissions were to be divided between Snelling and the defendants, and so were the profits of any operations made between the parties. Other letters establish the power to draw, and the obligation to pay.

It is true, that Humphreys was a partner in the house of the defendants when the letter of credit was given in October, 1838, and retired from it in March following, and that Kendall took his place. Notices of the withdrawal of Humphreys from the house, and of the introduction of Kendall into it, were published in Boston, but not in New Orleans; and the business was continued in the same name. After this change in the firm of the defendants, and the connection between Lewis and Snelling, we find the parties still going on as before; bills drawn and paid, cargoes purchased and shipped, and, after Lewis and Snelling had separated, the defendants continued to do business with the latter, and continued to recognize him as their agent. Kendall, the new partner in the house, was, previous to the withdrawal of Humphreys, a clerk in the employment of the defendants, and no doubt knew of the arrangements existing with Snelling; at any rate, they were continued long after he became a partner in the house, and he is bound thereby.

The facts of this case are so different from those in the cases of *The Carrollton Bank v. Tayleur et al.*, 16 La. 490, and *Von Phul and another v. Sloan and another*, ante, p. 140, more recently decided, that they are not applicable to it.

Judgment affirmed.

BARTLEY COX v. ABNER ROBINSON and others.

Every thing must be stated in the petition, which it is necessary for the defendant to know in order to put him on his defence.

The allegation in the petition, in an action against the principal and sureties on an attachment bond, that plaintiff has sustained damages "by the wrongful attachment, seizure, and detention of the slaves attached, whereby he has been deprived of his property, and of the services and wages of the slaves," accompanied with a prayer for the amount of such damages, and for general relief, will not support a verdict for the value of the slaves.

To recover damages for an illegal attachment, or for the hire of slaves seized by attachment, it is not necessary to put the attaching party in default. But where an attachment has been levied on slaves, and they have, with the consent of the debtor, remained in the hands of the plaintiff in attachment, to enable the former to recover their value, the latter must be put in default otherwise than by the institution of suit.

Where a plaintiff voluntarily abandons his attachment, he renders himself and his surety responsible in damages; and where such attachment has been set aside by order of court, it is *prima facie* evidence that it was illegally issued, and that damages to some extent have been sustained.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. The petition alleges that in April, 1830, the defendant Robinson commenced a suit by attachment in the District Court of the First District, against the plaintiff, and one Joshua Cox, to recover about \$4600 with interest, which he alleged to be due to him on a promissory note executed by Joshua Cox and the present plaintiff, by virtue of which writ fourteen slaves belonging to the plaintiff were seized; that for the purpose of obtaining the writ of attachment, the defendant Robinson entered into bond, and gave Nathan Morse as his security, for the sum of \$7000, conditioned that they would jointly and severally pay all such damage as the defendants in the attachment suit should suffer, in case the attachment should prove to have been wrongfully sued out.

It is further alleged, that sometime subsequent to the filing of the first petition, Robinson presented a supplemental petition, in which he claimed of the plaintiff and Joshua Cox, the sum of \$5903 87 with interest and costs, which was prayed to be satisfied out of the slaves attached; and that in order further to secure and indemnify the petitioner and Joshua Cox, Robinson, with N.

& J. Dick & Co., entered into another bond, in the usual form, for \$9000, conditioned to pay all costs and damages which might be sustained by the defendants in the attachment, in case it should be wrongfully sued out.

The petitioner represents that the said attachment was wrongfully sued out, and that, in April, 1834, Robinson was nonsuited on his original and supplemental petitions.

The plaintiff further represents that in consequence of the wrongful suing out of said attachment he has suffered damage to the amount of \$30,000. The said damage is alleged to have been caused by the wrongful seizure and detention of the fourteen slaves, whereby the plaintiff was "deprived of his property and of the services and wages of said slaves," since the day of April, 1830. He avers that he has sustained damage to the amount of \$10,000, in the loss of their services and wages, besides the deprivation of his property, the expenses and charges accrued in defending the suit, the time necessarily consumed and the vexation caused by it, amounting in the whole to \$30,000, which the defendants refuse to pay. After the ordinary prayer for a citation, &c., the plaintiff asks that the defendants may, jointly and severally, be "decreed to pay the said sum of \$30,000, and that all such further and other relief may be had as the nature of the case shall require."

It is not necessary to notice the answers of the widow and heir of Nathan Morse, as they are not appellants from the judgment against them; nor that of N. & J. Dick & Co., as the proceedings against them were discontinued by the plaintiff previous to the trial.

The answer of the defendant Robinson, denies that the plaintiff has sustained any damage as alleged. He avers that his attachment was issued in good faith and for a debt justly due, and only intended to secure the debt in a lawful manner; that it was discontinued for technical causes and reasons, not in any manner affecting the merits of the case; that another attachment was issued for the same debt, immediately after the dissolution of the first, which is still pending, on which ample security is given, and that the plaintiff must look for final indemnity to the bond given in that case.

On the trial it was proved that, sometime in the year 1825, the defendant Robinson became possessed by endorsement of a promissory note given by Joshua Cox and Bartley Cox to one Powell, for about the sum of \$4600. In September, 1826, Robinson commenced a suit on this note in Madison county in the State of Alabama, against both the drawers. They made a defence to the action, Joshua Cox being the most active and principal defendant. In April, 1830, Robinson, who is a non-resident of the State, meeting with the plaintiff in New Orleans, where he had the slaves, who were attached, for sale, commenced a suit against him, and had his property seized, without saying any thing about the suit which had been pending in Alabama for several years previously. The defendant, at different times, asked to see the notes or instrument of writing on which this demand was founded, before filing his answer; but it was not produced, although twice ordered by the court. In December, 1830, the defendant Robinson filed his supplemental petition, in which he stated the fact that he had, before issuing the attachment, commenced a suit in Alabama, and further stated that he had since obtained a judgment on the note, inclusive of principal and interest, amounting to \$5903 87 and costs, and prayed for a judgment for that sum, with interest and costs, to be paid out of the property attached. He made affidavit to the justice of the claim, and produced a record from the Circuit Court of Madison county, Alabama, to sustain his demand, but did not state, what was the fact, that Joshua and Bartley Cox had taken out a writ of error, under which the case was then pending in the Supreme Court of Alabama. Sometime after the filing of this supplemental petition, the Supreme Court of Alabama reversed the decision of the Circuit Court of Madison county in favor of Robinson, and remanded the cause for a new trial; whereupon Robinson voluntarily dismissed his suit in that court, and upon the production here of the record from the Supreme Court of Alabama, he was nonsuited, having failed to appear and prosecute the suit. It was further shown, that when the slaves were attached in April, 1830, Bartley Cox consented that they should remain in the possession of Robinson, and he at once took possession of them, and has had them ever since. Parol evidence was given of the value of the slaves and of their services. The jury found a verdict for the

plaintiff, for "six hundred dollars as naked damages for wrongfully suing out the attachment, and, for the value of the fourteen slaves including all interest, &c. to date, the sum of eleven thousand three hundred dollars" against Robinson, and for one hundred dollars against the heirs of Morse; upon which, after an ineffectual attempt to obtain a new trial, the defendant Robinson appealed.

In consequence of the jury finding the sum of \$11,300 as the value of the slaves, and saying nothing about their services or hire, the question has been much discussed at the bar, whether the value of the slaves was claimed either by the allegations or the prayer of the petition. The verdict of a jury ought always to respond to the issues made by the pleadings, and we always, except in hard cases, give as liberal an application of the principle as we can, so as to maintain the verdict and do justice between the parties.

The counsel for the appellant contends most strenuously, that he was surprised on the trial by the attempt, on the part of the plaintiff, to prove the value of the slaves, as the allegations of the petition did not inform him that such was the character of the demand, nor was any such thing prayed for; that, therefore, he did not come prepared with his proof on that part of the case, and that injustice has been done to him in consequence of this course of proceeding. We have looked carefully to the allegations in this petition, not with a view to criticise them, as in a hard case, but to ascertain what is really claimed.

The allegation is, that the plaintiff has suffered damages to the amount of thirty thousand dollars, "caused by the wrongful attachment, seizure, and detention of fourteen slaves, whereby your petitioner has been deprived of his property and of the services and wages of said slaves since the day of April, 1830, and has sustained damages to the amount of ten thousand dollars at least, in the loss of their services and wages, besides being deprived of his property," &c., wherefore he claims \$30,000 damages, and prays for general relief. The Code of Practice, art. 172, says that a petition must contain a clear and concise statement of the object of the demand, as well as of the nature of the title or cause of action, and this court has more than once said, that every thing must be stated, which it is necessary for the defendant to

know, to put him on his defence. 6 Mart. 510. 12 Ib. 639. We are constrained to say, in this case, that a claim for the value of the slaves is not set forth in that clear and concise manner contemplated by the law-maker, and we are, therefore, of opinion that the judge erred in permitting evidence to go to the jury of the value of the slaves, the allegations in the petition not being sufficiently explicit to put the defendant on his guard. The verdict must, therefore, be set aside, as it is clear that the principal object of the jury was to give the plaintiff the full value of the slaves, and to transfer them to the appellant.

In remanding the cause for a new trial, we propose to lay down some principles as applicable to it, which may guide the parties hereafter, and probably bring it to a more speedy termination. In doing so, we shall touch upon many points raised by the parties and decided by the judge of the Commercial Court on the bills of exception, or in his charge to the jury, without stating them as they were raised at the trial, and set forth in detail in the various bills of exception and the charge of the judge.

In the first place, we are of opinion, that the allegations in the petition in relation to the wrongful suing out of the attachment and the claim for the services of the slaves attached, are sufficiently set forth. That to recover damages for such wrongful suing out of the attachment, or for the hire of the slaves, it is not necessary to put the defendant in default under the article 1927 of the Code; but if the plaintiff shall claim the value of the slaves as damages, we think he ought to be put in default, the slaves having gone into the appellant's possession by virtue of a special agreement between the parties. It is not material what were the motives that induced the parties to enter into the agreement. It is sufficient that it has been made; and its effects must be regulated as other similar contracts.

In 8 Mart. N. S. 481, a decision is to be found which would seem to exempt a security on an attachment bond from any liability for damages, when his principal had a good cause of action, but failed to recover on account of some irregularity in the proceedings. The facts of that case are very different from this, and if they were similar, it may be well questioned if the doctrine would apply to a principal when sued on his bond.

If a plaintiff in an attachment voluntarily abandons it, he renders himself and his surety responsible in damages, 3 La. 103; and if it be set aside by order of the court, it is *prima facie* evidence that it was wrongfully issued, and that damage to some extent has been sustained. 3 La. 291.

As to the measure of damages, if it be apparent that the plaintiff in the attachment had a sufficient or very probable cause of action, and was prevented from getting a judgment by some technical objection, or irregularity in the proceedings, which could not be foreseen, then the damages should only be such as the party actually sustained in making his defence, and in being deprived of the use of his property. The probability and justice of the demand may be pleaded, and given in evidence in mitigation or justification of a claim for vindictive damages. After a careful examination of the decision of the judge of the Commercial Court and his charge to the jury, we do not see any error that requires correction, except in his admitting evidence to establish the value of the slaves, and charging the jury that it was not necessary to put the defendants in default, in any other manner than by instituting this suit, to enable the plaintiff to recover the value of the slaves.

As to that portion of the verdict which finds six hundred dollars damages for wrongfully suing out the attachment, we should not disturb it, if we could with propriety separate it from the other part; but as the whole case will go again before a jury, we do not doubt justice will be done to both parties.

The judgment of the Commercial Court is therefore reversed and annulled, and the cause remanded for a new trial, with directions to the judge to conform to the principles herein expressed, and otherwise proceed according to law; the plaintiff paying the costs of this appeal.

R. Hunt and Lockett, for the plaintiff.

Grymes, for the appellant.

Gallier v. Garcia, Sheriff, and another.

JAMES GALLIER v. MANUEL JOSEPH GARCIA, Sheriff, and another.

Where property is ordered to be sold for cash to satisfy the claim of a plaintiff: who, after the adjudication, agrees to allow the debtor time for the payment of the amount of his bid, and informs the sheriff that the arrangement is satisfactory to him, the officer is bound to convey the property to the purchaser, as if the amount had been paid in conformity to the terms of the adjudication.

A rule to show cause why the terms of a judicial rule should not be complied with, or the property again sold at the risk of the first purchaser, made absolute, the effect of which would be to annul a sale made by a competent officer, can have no effect unless signed by the judge.

Article 2589 of the Civil Code, relative to sales *à la folle enchère*, does not apply to those made by a sheriff under writs issuing on final judgments. In the latter, if the price be not immediately paid, where the sale is for cash, or if the proper surety be not given at once, when on credit, the sheriff must proceed forthwith, under article 689 of the Code of Practice, to sell the property anew. If he give any delay, it is at his own risk, and he will be responsible in damages to the plaintiff.

A sale *à la folle enchère*, must be on the same terms and conditions as the first, or it will be annulled.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. In April, 1836, Thomas Barrett, by a notarial act, sold to Gallier and one James Walsh a number of lots of ground situated in the faubourg Livaudais, in the parish of Jefferson, on which was erected a steam saw mill and other improvements, and thirteen slaves, for the sum of \$108,900, payable in five instalments, to wit: three notes amounting to \$19,260 on the 1st of May, 1837; four notes amounting to \$20,520 on the 1st of May, 1838; five notes amounting to \$21,780 on the 1st of May, 1839; six notes amounting to \$23,040 on the 1st of May, 1840; and seven notes amounting to \$24,300 on the 1st of May, 1841. Thirteen of these notes were drawn by Gallier and indorsed by Walsh, and twelve drawn by Walsh and indorsed by Gallier. To secure the payment of these notes a mortgage was retained on the lots, saw mill, and slaves.

The Mechanics' and Traders' Bank of New Orleans became the holders of five of these notes, one due in May, 1838, for \$5,100, and four others due May 1st, 1839, amounting altogether to \$22,150, exclusive of interest and costs. In December, 1839, the Bank, for the purpose of coercing the payment of this sum, at the

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instance of Gallier, took out an order of seizure and sale against the mortgaged property. In the petition the sum due to the Bank is set forth, and it is further stated that none of the other notes then due, amounting altogether to \$61,560, with interest and costs, had been paid, but that the holders of these notes are unknown to the said Bank; and the prayer is that the property may be sold for cash to pay the aforesaid sum of \$61,560, with interest and costs, the purchaser to assume the payment of the six notes falling due May 1st, 1840, and the seven notes falling due May 1st, 1841. The order of seizure was issued, and went into the hands of Manuel Garcia, sheriff of the parish of Jefferson, who seized the property, and advertised it for sale on those terms. After the seizure, the Bank, on the 14th of January, 1840, presented a supplemental petition in which it is stated that there was an error in the original petition, in alleging that \$61,560 was due on account of the original purchase, as it was ascertained that \$28,009 96 had been paid, leaving the balance due \$33,550 04, of which \$11,770 04 bore interest at the rate of ten per cent per annum from the 4th of May, 1838, and the sum of \$21,780, the same rate of interest from the 4th of May, 1839. It is prayed that the order of seizure may be so modified, and by an order of the same judge who granted the original order, it was so modified. But previous to the day of sale, the Bank, by its attorney, authorized the sheriff to announce "that of the above cash payment, the purchaser may liquidate the sum of \$18,550," by adding interest to different parts of it to date, and then giving notes, in three instalments, with good indorsers. The property was appraised at \$75,000, and struck off to Gallier, the plaintiff, for \$51,000, being more than two-thirds of its value. The attorney for the Bank, who, it seems, also acted for Gallier, then told the sheriff who would be the indorsers for the \$18,150 and interest, for which notes were to be given; and further told him that, in a few days, he would remit him an authorization from the parties to whom the cash was to be paid, to pass the deed of sale of the property to Gallier. The sheriff says he called several times for this authorization, which was not delivered to him for various reasons; that his costs were paid him by Gallier; and that various documents were delivered to him from the Bank and other holders of the notes, which, not being satisfactory,

he would not pass a sale ; that, finally, the counsel for Gallier told him, as the Bank and all the holders of the notes were satisfied, he did not care about a sale, but would rely upon the adjudication. With this the sheriff was not satisfied, although no creditor complained : and several months after, Walsh, the co-proprietor with Gallier, and a co-defendant in the order of seizure and sale, took a rule in the District Court, on the Mechanics' and Traders' Bank, the sheriff, and Gallier, to show cause why the terms of the sale should not be complied with, or the property again sold at the risk of Gallier, as he had not complied with the terms of the sale. What cause was shown against this most extraordinary proceeding, the record does not definitely inform us ; but it appears that the judge, after hearing the parties, made the rule absolute, and neither Gallier, the Bank, nor any one else, has ever appealed from the decision. In September, 1840, more than six months after the sale, the property was again offered for sale for cash, at the risk of Gallier, and in spite of his remonstrances and notice to all concerned, and of the express orders of the Bank represented by its regular attorney, who assured the sheriff that the Bank was satisfied and forbid the sale, the deputy sheriff, acting, as he said, in obedience to the orders of his principal, insisted upon selling the property, and did finally adjudge the whole of it to Felix Garcia, the brother of the sheriff, for \$10,500, which he says he received in cash.

After this sale, Gallier applied to the District Judge for an injunction to prevent the sheriff from putting Garcia in possession, or making him a deed of sale for the property. Gallier prays that the sale and adjudication may be annulled, and the sheriff ordered to make a deed to him, Gallier, in conformity to the adjudication made to him on the 29th February, 1840. The pleadings of the defendants do not materially vary this statement of facts. They ask for the annulling of the first adjudication, for a confirmation of the second, and to be put in possession, with damages.

Some time after the issuing of the injunction, Felix Garcia applied for a monition, which the plaintiff, Gallier, opposed, stating the facts herein recapitulated.

The case came on to be tried, when not a single holder of any one of the notes complained, or alleged that he was injured.

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Gallier showed that he had satisfied the Bank, the plaintiff in the order of seizure and sale. He also proved various payments to, and settlements with different holders of the notes, amounting to about \$36,160, from a large portion of which the holders of the notes say that Walsh was specially discharged by them, and the holders of the remaining notes say nothing about him, but extend the term of payment upon a continuance of the original mortgage, without having consulted him. Yet this person intervenes in the suit, and prays that the sale to Garcia may be confirmed, averring that it is legal, although his creditors would lose more than \$40,000 by it.

The inferior court, in its judgment, goes into the effect of the rule taken by Walsh on Gallier, the Bank, and the sheriff, ordering the property to be again sold at the risk of the purchaser, and pronounces it final and binding on the parties, declaring that it annuls the first adjudication to Gallier, not having been appealed from. The judge further declares that the sheriff acted illegally in the second sale, in adjudicating the property to Felix Garcia at less than two-thirds of its appraised value, which was \$75,000. He therefore annulled the adjudication, and perpetuated the injunction, declaring the adjudication to Gallier void. From which judgment Manuel, and Felix Garcia have appealed.

In this court Gallier has prayed for a correction of the judgment :

First. By declaring illegal and void the order or judgment of the 14th of July, 1840, on the rule taken by Walsh against Gallier, the Mechanics' and Traders' Bank, and the sheriff, which directed the property to be sold a second time at the risk of Gallier.

Second. By amending that part of the judgment which directs the property to be again sold, as the sale of the 29th February, 1840, was legal, and adjudicated the property to the plaintiff.

Third. By decreeing the adjudication made by the sheriff on the 29th of February, 1840, to be a complete title in favor of the appellee, Gallier.

Many of the difficulties that now embarrass this cause arise from the terms used in the order of seizure and sale, which directed the sheriff to sell the property for cash to the amount of \$61,560, with the interest due on the various instalments which

make up that sum, when the claim of the Bank was for only a little more than a third of that amount. Had the order directed the sheriff to make the sum due to the Bank, and compelled the purchaser to assume the payment of the notes outstanding, the amounts being stated, there would have been no difficulty, as the sheriff would then have claimed only the sum actually intended to be made, and have stated in his deed the assumpsit of Gallier in favor of the holders of the other notes, leaving them to enforce their payment in the manner provided by law, and particularly pointed out in the case of *Pepper, &c. v. Dunlap*, 16 La. 169. But the Bank and Gallier seem to have intended to represent the holders of the outstanding notes, having used language in the order of seizure and sale, which induced the sheriff to believe that he was bound to collect the whole amount of those notes, and hold it subject to the demands of the various holders. This was no part of his duty. None of the parties were in any manner the representatives of the holders of those notes, nor had they any right to enforce the payment of them on behalf of the holders. When the adjudication was first made, if the amount due to the Bank had been paid or adjusted to the satisfaction of its agents, it was the duty of the sheriff to have made Gallier a deed, to have expressed in it that he was to pay the outstanding notes, which should have been described as accurately as possible, and to have left the holders to take care of their own interests, at such times and in such manner as they might adopt and the law would allow. This not having been done, and the adjudication having been declared null by a judicial decree, to which both the Bank and Gallier were parties, and no appeal having been taken from it, the embarrassments are increased. The modification of the order of seizure and sale seems not to have been noticed by any one in the proceedings subsequent to the first sale, and the sheriff appears to have insisted on the payment of the whole sum for which the order was originally taken out, notwithstanding the admission in the supplemental petition of payments to the amount of \$28,809 96.

It is not questioned by any one that the adjudication to Gallier, made on the 29th of February, 1840, was legal, nor, if it had been complied with, that it would have entitled him to a deed. The

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complaint made by the co-defendant of Gallier is, that the terms had not been complied with, to wit, that he had not paid the Bank or the holders of the outstanding notes ; whereupon the District Judge granted the rule heretofore mentioned, and, after hearing the parties, ordered the adjudication to be annulled, and the property to be again offered for sale at the risk of the first purchaser. This judgment the judge says he will not now examine into, as he considers it final, none of the parties having appealed therefrom. In this we differ from the learned judge, and consider the question still open.

If the doctrine relative to sales *à la folle enchère* be applicable to sales made by sheriffs, the intervention of the court was entirely unnecessary, as the officer had the right to judge whether the terms of the bid had been complied with, and if they had not been, to sell again ; and the legality of his proceedings would be inquired into whenever a suit should be brought to recover the difference in the price between the first and second adjudications. But in this case the plaintiff avers, and we think correctly, that the pretended judgment on the rule is no bar to an investigation of the whole question, as it has not been signed, and has no force. The record shows that the judgment has not been signed, and it, therefore, stands as if it had not been given ; at least, the irregularity is such as may be inquired into on the monition applied for by Felix Garcia ; and as its effect, if it have any, will be to annul an adjudication made by a competent officer, it is as essential that it should be signed by the judge, as any other judgment which decrees the rescission of a sale.

We now come to the examination of the prayer of the plaintiff that the sheriff be ordered to make him a sale, in conformity with the adjudication of the 29th of February, 1840. If the plaintiff has complied with the bid which he made at that time, there is no question but that he is entitled to a conveyance.

The evidence shows that Gallier has fully satisfied the Mechanics' and Traders' Bank, the plaintiffs in the order of seizure and sale, for the sum for which it was taken out, and that Walsh, so far as the Bank is concerned, is discharged, from all liability. The balance, then, for which a cash payment was to be made, was, according to the supplemental petition, less than \$12,000,

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with interest and costs. The testimony of the Cashier of the Gas Light Bank shows that \$28,800 has been paid to that institution. The Cashier of the Merchants' Bank proves that the sum of \$2692 89 has been paid on account of a note for \$5220 held by it, and that for the balance time has been accorded to Gallier. Lanfear proves that he holds a note for \$4700, and it is shown that \$1500 has been paid on account, and satisfactory arrangements made for the balance. Brown, Brothers & Co. held three notes, amounting to \$10,940, for which Nicholson, a member of that firm, says that Gallier had satisfactorily arranged with him, and that he had agreed to discharge Walsh. The Cashier of the Citizens' Bank proves that Gallier has paid a note of \$4200 held by it, and that Walsh is entirely released. Other witnesses prove that Gallier was willing to make satisfactory arrangements with them in relation to other notes; and an examination of the testimony convinces us that, but for the interference of Walsh, and the refusal of the sheriff to pursue the orders given him by the plaintiffs in the order of seizure and sale, that the whole matter would long since have been settled to the satisfaction of all the parties holding the notes.

As to the sale made on the 9th of September, 1840, we have no doubt that the District Court was correct in decreeing it illegal, and in annulling it. After a most deliberate examination of the question, we are of opinion that the doctrine relating to sales *à la folle enchère*, is not applicable to those made by a sheriff under writs issuing on final judgments. Article 2595 of the Code declares that judicial sales are subject to the same rules as other public sales, in all such things as are not contrary to the formalities expressly prescribed for such sales, and with the modifications made thereafter. When we turn to article 2589 of the Code, and observe the formalities required for selling property at the risk of the first bidder, we find them altogether different from the directions given to the sheriff by article 689 of the Code of Practice. Under the former article, if the price bid be not paid, no steps can be taken, until after the expiration of ten days, to have a second sale, and then the customary advertisements must be published; but, under the latter, no such delays or formalities are necessary; the sheriff may, if the price be not paid, where the sale is for

cash, or if the proper sureties are not given when it is on a credit, proceed anew to sell the property, and adjudge it to another person. The decisions of this court have been entirely adverse to the idea that the sheriff has to wait ten days, and then sell after the customary notices. In 3 La. 475, it was held that the sheriff was not bound to wait three days to enable a bidder to find security, although the sheriff is allowed that number of days to make a deed. In 4 La. 392, the sale was for cash, and it was decided that the sheriff was not bound to wait, as the bidder did not make immediate payment, but had a right to sell anew. This doctrine has, in other cases, been affirmed by this court, and very recently, in 19 La. 307, we said that if a sheriff gives any delay, he does it at his own risk, and is responsible in damages to the plaintiff in the execution. When a sale is made for cash, the sheriff should, at once, call on the purchaser for payment, and when on a credit, it is his duty to require the names of the sureties and the execution of the necessary obligation to pay the price offered.

The impression that article 2589 of the Civil Code does not apply to sheriffs' sales, is not a new one, as the decision in 4 La. 392, establishes.

But admitting that a second sale could have been made by the sheriff, at the risk of Gallier, still the adjudication to Felix Garcia would be null and void, as the sheriff sold the property for less than two-thirds of its appraised value. It has been repeatedly decided that the second sale must be on the same terms and conditions as the first; and this not having been the case in the present instance, we concur with the District Judge in his opinion that the second sale was a nullity. It was the interest of the creditors, as well as of the debtors, that the property should sell for as much as possible, and none of them having waived their legal right to have the property sold on a credit of one year, if it did not bring two-thirds of its appraisement in cash, the sheriff had no right to change the terms.

The judgment of the District Court is, therefore, affirmed, so far as it annuls the adjudication of the property made to Felix Garcia, by the sheriff of the parish of Jefferson on the 9th of September, 1840, and the injunction perpetuated which prohibits the sheriff from making a deed to said Garcia. And it is further or-

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dered and decreed, that so much of said judgment as annuls the adjudication of the property described in the petition to James Gallier on the 29th of February, 1840, be avoided and reversed, and said adjudication is hereby confirmed; and the sheriff of the parish of Jefferson is hereby directed to make a deed to said Gallier on his producing to him evidence that the Mechanics' and Traders' Bank of New Orleans have been satisfied to the amount for which the order of seizure and sale originally issued, and to insert in said deed a clause that said James Gallier binds himself to pay the outstanding notes of Walsh, indorsed by said Gallier, and those of said Gallier indorsed by Walsh, as specified in the aforesaid adjudication; leaving the holders of said outstanding notes their legal rights to enforce their claims in any lawful manner against said James Gallier, or against the property so sold to him. This judgment is not in any manner to prejudice the rights or claims of Walsh, in any future settlement or contest with Gallier in relation to their common property or partnership transactions. The costs of this appeal, and those in the court below, to be paid by the defendants in the injunction.

L. C. Duncan and Eustis, for the plaintiff.

Canon, for the appellants.

 BRISON STILLWELL v. WILLIAM BOBB—APPLICATION FOR A
RE-HEARING.

Evidence, presented by one of the parties, but not contained in the record, will not be permitted, under any circumstances, to influence the decision of the court.

The demand to be made on a note payable at a particular place, cannot be assimilated to the amicable demand required by the Code of Practice. The want of the latter must be pleaded to put the plaintiff on the proof of it, and a failure to establish it does not prevent his obtaining judgment, but only subjects him to the payment of the costs incurred before the appearance of the defendant. The former must be alleged and proved, or the plaintiff cannot recover.

Cases of *Wetmore & Co. v. Merrifield*, 17 La. 513, and *Booraem v. Merrifield*, Ib. 594, overruled, so far as they go to establish that in an action against the drawer of a bill, or maker of a note payable at a particular place, proof of a demand at such place is not necessary, where want of amicable demand has not been pleaded.

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APPEAL from the District Court of the First District, *Buchanan, J.**

C. M. Jones, for the applicant.

GARLAND, J. The counsel for the plaintiff bases his application for a re-hearing in this case on three grounds: *First.* The omission of the court to notice a fact which he says was alleged in argument to have been given in evidence on the trial, and not denied by the other party, but which is not found in the record, to wit, that by the law of Mississippi, although a note may be payable at a particular place, an action may be maintained on it and judgment obtained, without proving a demand at the place.

Second. On the principle asserted by this court in the cases of *Wetmore & Co. v. Merrifield*, and *Booraem v. The Same*, in the 17 La. 513, 594, that it is not required to be proved that the laws of Mississippi, where a note is made payable, do not make it necessary to present it for payment at the place designated therein, in order to maintain an action against the maker, when the want of an amicable demand is not pleaded.

Third. That it was proved that since the maturity of the note, the defendant, Bobb, had repeatedly promised to pay the note; and that such promise must be considered a waiver of any objection to the want of demand.

Upon the first point, it is true the counsel for the plaintiff did assert in the argument, that it was proved by a witness that, according to the laws of Mississippi, it was not necessary, in order to obtain a judgment in that State on a note payable at a particular place, that a demand at the place should be proved. But when we examined the record, no such evidence was in it; and the want of proof of demand at the place of payment, is a ground specially urged by the counsel for the defendant why the plaintiff cannot recover. Since the application for a re-hearing has been made, the counsel for the plaintiff has handed to us a statement of a highly respectable member of the bar, in which he says that he did, on the trial, testify as stated by the plaintiff's counsel, and

* See the original opinion pronounced in this case, 1 Robinson, 311.

the judge certifies that, according to the best of his recollection, the witness did so testify.

We have felt disposed, under the circumstances of this case, to do all in our power to relieve the plaintiff; but we cannot now permit the statements submitted to us, to influence our opinions. Though perfectly satisfied, in this instance, of the pure intentions of the gentleman who has presented the documents, yet we think it would be establishing a precedent that might hereafter be abused, if we were to permit our judgments to be influenced by evidence presented by one of the parties, not contained in the record. But even if we were disposed to receive these statements, it is very doubtful, as intimated in our opinion, whether the testimony would aid the plaintiff.

Upon the second ground, we admit that the decision in the 17 La. 513, was calculated to induce the counsel to believe that, as the want of demand of payment at the place mentioned in the note was not specially alleged, it was not necessary to prove it. The court, in that case, seemed to assimilate the demand to be made on a note payable at a particular place, to the amicable demand mentioned in the Code of Practice. This court have always made a marked distinction between the two kinds of demand. The want of an amicable demand must be pleaded to put the plaintiff on the proof of it; and a failure to prove it does not prevent his obtaining a judgment, but only makes him liable for the costs previous to the appearance of the defendant.

The other demand has always been held to be a condition precedent to a recovery. The plaintiff must not only allege, but prove it; and a failure to prove it according to the allegation, is a bar to a judgment. This principle had been considered settled since the decision in the case of *Mellon v. Croghan*, 3 Mart. N. S. 423, until the cases presented and relied on by plaintiff's counsel were decided. Those cases were decided when the court was not full, and when a mass of business was pressing on it. The judge who drew up the first opinion has since discovered that, in making a copy of the first draft of the opinion which was submitted to his colleagues in council, nearly a whole sentence was accidentally omitted which materially altered its meaning. Upon a reconsideration of these decisions, we are disposed to think they

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should not be considered as changing the previously established practice of this tribunal.

Upon the third point, that the defendant had promised to pay the note since its maturity, we have only to remark, that the evidence does not show that he promised to pay it at any other place, than that at which it was made payable. The witness states that Bobb was in New Orleans when he made the promises to pay, but he does not say that he agreed to waive the demand at the place specified in the note.

Re-hearing refused.

THOMAS S. EDRINGTON v. HENRY TÊTE and others.

APPEAL from the District Court of the First District, *Buchanan, J.*

Preston, for the appellant, submitted this case without argument. No counsel appeared for the defendants.

MORPHY, J. The petition represents that the defendants, and other persons therein named, are joint owners of the steamboat Paul Jones, a vessel by them employed in carrying goods and passengers for hire, and that they are indebted to the plaintiff, *in solido*, in the sum of \$360 25, for this, that in the month of June, 1839, the plaintiff contracted with Robert Scott, the captain of said steamer to tow a boat from the city of New Orleans, to his (the plaintiff's) residence in the parish of St. John the Baptist; that owing to the fault, negligence, or evil intentions of the captain, the boat was capsized and sunk in the Mississippi river, whereby the plaintiff sustained damage to the amount claimed, in the loss of money, clothing, merchandize, and other articles contained in the boat. The defendants plead the general issue, and aver that the boat spoken of was placed in tow of the steamer Paul Jones, by the plaintiff himself, and entirely at his own risk, that no contract was ever made with him as alleged, and that they have never occasioned any damage or injury to the petitioner, and are in no manner indebted to him. The defendants had a judgment in their favor, from which the plaintiff has appealed.

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The judgment is, in our opinion, fully sustained by the evidence in the record ; but we are told that it should have been one of nonsuit, and we are asked so to change it. We can see no reason why this should be done. On the trial of the case the plaintiff's counsel moved the court for a continuance, on the ground that a commission previously issued had not yet been returned. This motion, having been resisted by the opposite party, the counsel left the court without pressing his motion, or excepting to the opinion of the court overruling it. The defendants then proceeded with the cause, and, having made out their defence, were entitled to a judgment on the merits. The plaintiff had the privilege of discontinuing his suit, on paying the costs, and of beginning his action anew. This he did not think proper to do, but abandoned the cause, leaving it in our opinion optional with the defendants either to require a judgment of nonsuit against him, or to try the case, *ex parte*, and demand a final judgment. Code of Prac. arts. 491, 536. The plaintiff has no good ground of complaint. We are bound to presume that the judge properly refused the continuance asked for, as the plaintiff has not undertaken to show that there was error in the decision.

Judgment affirmed.

DANIEL TREADWELL WALDEN v. SAMUEL JARVIS PETERS
and others.

Plaintiff having offered, through a broker, to sell a piece of property for a fixed price, placed a written memorandum in the hands of the latter, specifying the conditions. A list of persons willing to purchase on the terms proposed, with the proportion which each would take, and the names of their respective endorsers, was subsequently approved and signed by the plaintiff. These memoranda having been placed in the hands of a notary to prepare an act of sale, the completion of the sale was arrested in consequence of a difficulty raised by the defendants as to the validity of plaintiff's title. *Held*, that the facts prove a contract binding on the parties ; and that the assertion of title to the premises by the defendants, under such circumstances, and with such evidence of right, could not subject them to damages for slander of plaintiff's title.

In an action for slander of title, plaintiff must prove malice in the defendant. But where it appears that the latter had no color of title at the time, malice may, perhaps, be inferred.

The plaintiff in a petitory action, who has reasonable ground to believe that he has good cause of action, will not be liable to damages on discontinuing or losing his case. Nor can any action for slander of title be maintained, where defendant has good reason to believe that he is the real owner of the property.

The principal object of a suit for slander of title is to compel the defendant either to waive all right, or to institute suit and thereby enable the plaintiff to establish his title.

In an action for slander of title, defendants, who had reconvened by asserting title under a contract with plaintiff, and prayed that he might be condemned to execute a conveyance to them or to give security, as well as for damages, on the second day of the trial, but before plaintiff had concluded his evidence, moved to discontinue : *Held*, that they were entitled to discontinue the whole plea in reconvention, including the claim of title.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

BULLARD, J. The plaintiff, Walden, represents in his petition that he is the lawful owner and possessor of a tract of land in the parish of Jefferson, of about eight *arpens* front by a depth of about one hundred. That the defendants do publicly declare and give out that they are the owners of said tract of land, and that many persons are induced to believe, in consequence of the speeches and declarations of the defendants, that he is not the owner, but that it belongs to them. That if it were not for these declarations he could advantageously sell said tract of land, and that he has thereby sustained damage to the amount of \$100,000. He, therefore, prays that he may be decreed to be the true owner of the tract of land, and that he may have judgment for his damages aforesaid, and for general relief.

This suit was instituted on the 2d of February, 1837, and, on the 16th of the same month, the defendants filed their first answer, in which they aver that they purchased from the plaintiff the tract of land described in the petition, through Palmer, a broker, by act under private signature, dated Nov. 18, 1836 ; and they aver their readiness to comply with the stipulations, terms, and conditions of the contract, when the plaintiff's title to said property shall be decreed to be valid, or when he gives security as required by law. They allege that the titles are informal and their validity doubtful, and that the plaintiff knew of their doubtful validity when he signed the contract under private signature. They say, further, that if the title had been formal and free from doubt, they might

have re-sold the property at a large profit, at least of \$150,000, which the plaintiff is liable to pay to them if he should fail to make good said titles, or to give security according to law.

They offer to comply with the terms of the contract, and pray that the plaintiff may be decreed to execute a proper deed of sale by public act; and the respondents being fearful of eviction by the title of the heirs of Beal, the plaintiff's vendor, pray that the plaintiff may be adjudged to give security.

On the 3d January, 1838, the plaintiff filed a supplemental petition, in which he alleges that since the institution of the suit the property has fallen very much in value, and that he could not then sell it except at a much lower price than that for which it might have been sold at the time when the defendants set up their unfounded claim. He, therefore, claims \$100,000 damages.

To this an answer was put in during the same month, (January, 1838,) in which the defendants allege that they have long since renounced all their right, if any they had in this case, as will appear from the record; but that, if they should be compelled to form issue, and their plea be overruled, they deny their liability as alleged in the supplemental petition, and all the allegations therein contained. The record shows a formal waiver of title, dated May 18, 1837.

The trial commenced on the 1st of December, 1840, and on the next day, as appears by a bill of exceptions, the defendants, before the plaintiff had concluded his evidence, asked the leave of the court to discontinue their entire demand in reconvention, to wit, every part of the original answer which set up title to the property, their demand for the execution of a title or for security, and their demand for damages, which was objected to by the plaintiff; but the court gave the leave so far as it refers to the demand for a public title, security, and damages, and refused it as to the claim of title set up by the defendants.

Whereupon it was entered upon the minutes, by order of court, that the defendants be allowed to withdraw the two demands in their answer, to wit, *first*, that the plaintiff should be decreed to execute a deed of sale by public act, and *second*, that the plaintiff should be decreed to give security against disturbance; and it was

further ordered, that the defendants should be allowed to discontinue any claim for damages contained in their answer.

Thus it appears that, pending the trial, the issues upon which the jury was sworn to pronounce were totally changed. The defendants had entered a formal waiver of title to the land under their contract with the plaintiff, and of their demand for security to make good the title derived from him, and also of that for damages. Nothing then remained to try but the original matter set up in the plaintiff's petition, to wit, the slander of his title by the defendants. Yet the trial proceeded, and the jury found a verdict for fifty thousand dollars damages. A new trial was granted as to one of the defendants, and the others have appealed.

This verdict can only be justified by a slander of title; for it cannot be pretended that the jury intended to give damages against the defendants for refusing to complete the contract for the purchase of the land as set up in their answer. No damages were demanded on that account, and, indeed, the plaintiff denied that there ever was such a contract, and the judge so instructed the jury. The question, therefore, which we have to decide is, whether the evidence proves a slander of title which entitles the plaintiff to such damages.

Before we proceed to examine this question it is necessary to premise that, as was alleged in the original answer, the plaintiff had offered to sell the property in question, through Palmer, a broker. A memorandum in the record, signed by the plaintiff, shows that he offered to sell the plantation in the parish of Jefferson, setting forth its description and extent, about which there is no dispute, at the rate of \$250,000, (he retaining one-fourth,) the price to be payable one-fourth in cash, and three-fourths in one, two, three, and four years, the notes to be drawn and endorsed to his satisfaction. This proposition is dated the 18th Nov. 1836, when it was handed to the notary. Another document is exhibited in substance as follows:

"Amount of three quarters interest is \$187,500." "We the undersigned agree to take an interest in the purchase of Walden's property, in the proportions fixed opposite our names; the time and manner of disposing of said property to be fixed by a majority in number and amount, so soon as the transaction with D. T. Wal-

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den be completed by a notarial act. New Orleans, Nov. 26, 1836." This is signed by the defendants, and the amount each is to pay is affixed to the names. There is a third memorandum, setting forth the names of the purchasers somewhat varied, which is signed by Walden, and approved by him, with a condition added by him that he should retain possession for a certain length of time. This last document is dated December 15, 1836. These memoranda, it appears, were deposited with a notary, with a view of having the conveyance drawn up.

On the trial the defendants took a bill of exceptions to the charge given by the judge to the jury, in which he instructed them that the above mentioned memoranda, taken together, did not amount, in his opinion, either to a sale or a promise to sell. "I see," said he, "in these documents mere proposals passed between the plaintiff and the defendants, relative to an intended sale, but no such final action of the parties on these proposals, as can amount either to a sale, or to a promise to sell. If there was no sale, Walden was, at the institution of this suit, and is still the owner of the property in question, and the giving out by the defendants that they were the owners, was a slander of Walden's title."

Up to the time of the final rupture of this negotiation, on account of a supposed defect in the plaintiff's title, it was not intimated that there was any thing wanting to constitute a promise to sell. The thing and the price were certain, and, after the signature by Walden of the last memorandum containing the names, shares, and endorsers of the purchasers as finally settled, there can be no doubt as to the parties. Here was a written proposition to sell, a written agreement signed by various persons, or by their authority, to buy, and it appears to us that through the intervention of the broker there was a concurrence of minds, a consent, sufficient to constitute a contract between the parties, and that the court erred in instructing the jury that there was no promise to sell. The last memorandum, it is said, presented new persons as purchasers. Still it was approved by the plaintiff; and it is not for him to say that the new condition, suggested by himself, was not accepted. It was not objected to in any part of the negotiation. The plaintiff himself hurried the notary to make out the

conveyance ; and the notary, who is at the same time an experienced and able member of the bar, was requested by some of the defendants to examine the title of the plaintiff. He did so, and gave it as his opinion that it was defective. It was in consequence of this difficulty, and not of any want of understanding as to the essential conditions of the contract, that the sale was not completed by a notarial conveyance.

If, under these circumstances, the defendants, waiving all objections to the title, had accepted the conveyance, there can be no question that they would have been the owners as to the whole world. And if, on the other hand, they had sued for a conveyance, alleging title, so far as the plaintiff was concerned, as evidenced by the different memoranda, it is not easy to perceive how they could have failed ; but if they had, they would not have subjected themselves to damages for asserting title under such circumstances, and with such evidence of right emanating from the plaintiff himself. Such was the doctrine sanctioned by this court in the case of *Henry v. Dufilho*. It was said in that case, which was one of slander of title, that the plaintiff was bound to show malice in the defendant. If it appeared that the defendant had no color of title when he instituted his petitory action, malice might, perhaps, be inferred from that circumstance. But the evidence showed he had purchased the land in good faith, and had every reason to believe himself the owner—so that this case narrows itself to the single point, whether a plaintiff, who has reasonable ground to believe he has a good cause of action; is liable to an action of damages, where he discontinues or loses the case. The question carries its own answer.

In the case now before the court, if there was any slander of title, it consisted in asserting or pretending, not by suit, but in conversation, that the defendants were owners of the land in virtue of this contract, and that the plaintiff was not. According to the doctrine settled in the case referred to above, if the defendants had sued to compel a conveyance, alleging themselves to be the owners by purchase from the plaintiff himself, they could not have been made to pay damages in case of failure, without showing malice ; nor *a fortiori* can they be so, when simply asserting the same in conversation, or setting up such pretension by way of reconvention.

The principal object of such a suit, according to the Spanish law, from which we derive it, is to quiet titles, or to compel the defendant either to waive all right, or to institute a suit and thereby enable the plaintiff to make good his title. Whenever there is a waiver of title, that object is attained. "The object of the law," says this court in the case of *Livingston v. Heerman*, "was to protect possession; to give it the same advantages when disturbed by slander as by actual intrusion; to force the defamer to bring suit, and throw the burden on him of proving what he asserted." 9 Mart. 714.

After the waiver of title on the part of the defendants, and, necessarily, of their reconventional demand, nothing remained to be tried but the naked fact, whether the defendants had ever claimed the plaintiff's title; and the court, in our opinion, erred in refusing to give effect to the formal waiver, and in refusing leave to discontinue the claim of title set up in the answer.

It appears to us manifest, from all the facts of the case, that when the plaintiff instituted this action, his object was to obtain a disclaimer of any right on the part of the defendants. The defendants, on the other hand, were then disposed to hold the plaintiff to this bargain. But it appears in evidence, that the property began to fall in value; and when, at last, the defendants concluded to abandon, the plaintiff complained of the depreciation, and demanded heavier damages. The relative position of the parties was changed, and the war was not what might have been expected from the manifesto. Under these circumstances, it is difficult to say which party was best entitled to damages. The defendants had, at the inception of the suit, a promise to sell, which protects them, in our opinion, from the charge of slandering the plaintiff's title in a legal sense, because it shows the absence of malice, although the defendants may have been mistaken as to the legal extent of their rights. As the case now stands, the title of the plaintiff is as much quieted by the disclaimer, as if judgment had been pronounced against the defendants in a petitory action. Being of opinion that the plaintiff has no cause of action, it is useless to remand the case for a new trial.

It is, therefore, ordered and decreed that the judgment of the
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Parish Court be reversed, and that ours be for the defendants, with costs in both courts.

Canon and Grymes, for the plaintiff.

Micou and L. Peirce, for the appellants.

PIERRE DEBUYS v. FELIX CONNOLLY.

A witness is incompetent on the score of interest only where he has a direct interest in the event of the suit, and is called to testify in support of that interest ; or where the verdict and judgment, to obtain which his testimony is used, would be admissible evidence in his favor in another suit.

One who had been offered as security on a twelve months' bond for the price of property sold under execution, and rejected by the sheriff as insufficient, will be a competent witness to prove his own solvency, on an opposition by the first purchaser to the homologation, under the monition law of 10th March, 1834, of a second sale, made at the risk of the first purchaser, on the ground of the insufficiency of the security. He has no interest either in the event of the suit, or in the question. The bias which may result from being called on to testify to his own solvency, is not enough to exclude him. The interest which renders a witness incompetent, must be a pecuniary one ; that which results from his feelings or his wishes, goes to his credibility only. Nor is it sufficient to exclude a witness offered under such circumstances, that he was the endorsee of the note upon which the original suit was instituted ; his testimony cannot in any way effect his liability as such.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J. Certain lots of ground belonging to the defendant, Connolly, having been seized to satisfy the mortgage claim of the plaintiff, were offered for sale by the sheriff of the parish of Jefferson, on the 23d of March, 1840, and were adjudicated to the defendant for the price of \$2500, payable in a bond at one year from the day of sale. The conditions of the sale not having been complied with by the purchaser, who had offered John Mitchell as his security on the bond, the sheriff, who had refused to receive the security, was ordered by the plaintiff's attorney to re-advertise the property for sale at the cost and risk of Connolly ; and on the 3d of June following, the same was finally adjudicated to L. F. Generis for \$4050, payable at one year's credit, for which the purchaser gave his two bonds, one in favor of the creditor for the

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balance due him, and the other in favor of the sheriff, to be applied to the payment of privileges and mortgages existing on the property, in their order.

On the 30th of June, 1840, a monition was applied for by Generis, to which Connolly made opposition on several grounds. The opposition was overruled by the inferior court, which rendered judgment in favor of the applicant, from which judgment the defendant has appealed.

Of the different grounds upon which the opposition of the defendant is founded, we have deemed it unnecessary to notice but one. His counsel contends that the second adjudication made by the sheriff to Generis, is illegal and void, because good and sufficient security having been offered by Connolly immediately after the first adjudication, the sheriff had no right to sell the property anew, but ought to have taken the defendant's bond, and have executed a deed of sale to him according to law.

Before expressing our opinion on the question raised by this ground of opposition, we must dispose of a bill of exceptions taken to the opinion of the District Judge, overruling the objections of the applicant to the testimony of John Mitchell, who was the person offered to the sheriff as the defendant's security on the bond, and who was introduced as a witness in this suit, to prove his own solvency. His testimony, which was admitted by the lower court, is sought to be excluded on the score of interest. We think the judge *a quo* decided correctly in receiving it. It is a well known rule of evidence in relation to the competency of witnesses on the ground of interest, that such persons only are excluded as are directly interested in the event of the suit, and are called on to support that interest; or where the verdict and judgment, to obtain which their testimony is offered, would be admissible evidence in their favor in another suit. 3 Mart. N. S. 11. Ibid. 270. 6 Mart. N. S. 284. 10 La. 425. 12 La. 290. In this case, we are unable to discover what degree of interest the witness would have either in the event of the suit, or even in the question. It is true he is called on to show his own solvency, and his feelings might perhaps be affected; but the bias which this sort of interest may create, is not sufficient to exclude him. This court has often said, in relation to such questions, that "the interest which repels a

witness must be a substantial one, *i. e.* a pecuniary one, affecting in some manner his property ; it does not suffice that it affects his feelings, his affections, or his wishes." 3 Mart. N. S. 270. This latter might perhaps go to his credibility, but it is clear that it does not in any manner render him incompetent.

On the merits of this ground of opposition, the evidence shows that the person who was offered as security on the defendant's twelve months' bond, considered himself good for five or six thousand dollars, and that the amount of the purchase being two thousand five hundred dollars, out of which six or seven hundred dollars only were to be paid to the seizing creditor, he would have enough to pay this obligation from the sale of his property, after paying all his antecedent liabilities. This is not, however, the only proof of the security's solvency. The settlement made by Mitchell with his minor children in the Court of Probates, and which was received in evidence without any specified objection on the part of the opponent's adversary, shows that Mitchell's share amounted to \$36,000, and nothing was adduced to establish that his share had been in any way diminished, or that the settlement was incorrectly made. Taking the evidence as it is found in the record, and to contradict which no sort of testimony has been produced, we feel bound to believe that the security offered was sufficiently solvent, and that the sheriff ought not to have rejected him. Indeed, the fact of his sufficient solvency is corroborated by the testimony of the sheriff himself, who says that he saw Mitchell's name on the tax list, and that he paid him his taxes. The sheriff was, therefore, aware that the security had taxable property.

With regard to the other objection made to Mitchell's testimony, on the ground that he was the endorser of the note upon which the original suit was brought and the property sold, it suffices to say that his testimony was not introduced to impair or destroy in any way his liability ; that he was not a party to the suit in which the bond was to be taken ; and that, whether the drawer of the note gave a twelve months' bond or not, could not in any manner deprive the creditor of his recourse against the endorser. This objection was properly overruled. 3 Mart. N. S. 270.

Considering, therefore, that the security offered by the defendant at the first adjudication, was sufficient ; and that, under art.

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689 of the Code of Practice, the sheriff is only authorized to expose the property seized to a second sale, when the purchaser does not offer the proper sureties where the sale has been made on credit, we are constrained to come to the conclusion that the opposition is well founded ; that the sale made by the sheriff to L. F. Generis was illegally made ; and that it ought to be annulled and set aside.

It is, therefore, ordered that the judgment appealed from be avoided and reversed ; that the defendant's opposition be maintained ; and that the sale made by the sheriff of the parish of Jefferson to L. F. Generis be annulled and set aside ; the applicant paying the costs in both courts.

Canon, for the homologation of the second sale. No counsel appeared for the appellant.

GREGORY BYRNE v. GEORGE TAYLOR.

Where property has been seized under a *fi. fa.*, the sheriff may proceed to sell though the return day has passed, or the writ itself has been returned into court ; and payment to the sheriff, under such circumstances, for the purpose of liberating the property seized, will discharge the debt.

APPEAL from the Commercial Court of New Orleans, *Watts, J. MARTIN, J.* The plaintiff is appellant from a judgment dissolving an injunction, which he had obtained to stay the proceedings of the defendant under an execution issued in pursuance of a judgment which the latter had recovered against him. A former execution had been levied on two slaves, and on the interest of the present plaintiff in two steamboats. The slaves were sold, and the proceeds retained by the sheriff to satisfy a mortgage which was on record in favor of the vendors of the plaintiff Byrne. It does not appear that the proceeds of the sale were sufficient to satisfy the mortgage and leave any thing to be applied to the execution, nor that the interest in the steamboats was sold at the time the writ was returned into court. The present plaintiff afterwards paid the whole amount of the judgment and costs to the sheriff, notwithstanding which the defendant sued out an alias *fi. fa.*, which

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is the one stayed by the injunction the dissolution of which is complained of.

The counsel for the appellee contends that the injunction was improperly issued, as the payment by the appellant can not avail him, having been made to the sheriff after he had ceased to have any authority to receive it, by the expiration of the return day, and his parting with the writ. The counsel has relied on the case of *Rothschild et al. v. Ramsay*, 2 La. 280. His adversary has replied, *ex ore tuo te judico*. The case relied on establishes, indeed, the general proposition that "the sheriff is no further the agent of the plaintiff in execution, than while the *fi. fa.* remains in his hands. The instant it is returned into court, or the return day expires, his authority to enforce the judgment, or to receive the amount ceases." But the case establishes an exception to this proposition, in favor of a sheriff who has previously made a levy, in which case the law permits him to sell what he has seized. It is, therefore, clear that when the sheriff is authorized to sell, the defendant in the *fi. fa.* may prevent the sale, and liberate his property from the seizure by the payment of the debt and costs. This the appellant appears to have done.

The first judge, in our opinion, erred in dissolving the injunction.

It is therefore ordered, that the judgment be reversed, and that the injunction be made perpetual, the defendant and appellee paying the costs in both courts.

Larue, for the appellant.

H. R. Denis, contra.

THEOPHILUS PARK and another v. WILLIAM PORTER.

An order to deliver to the consignee, property seized by attachment, on a vessel in which it had been shipped for the purpose of being sent out of the State for sale, on his executing bond with security to abide the judgment of the court, is final as to the possession of the property, and may be appealed from.

A judgment may be so far final as to be subject to appeal, without being final as to the point at issue.

To entitle a party to an appeal from an interlocutory judgment, it is not necessary that

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the injury be absolutely irreparable; it is sufficient that it may become irreparable in consequence of the final action of the court.

The possession of a bill of lading, like that of a bill of exchange, is *prima facie* evidence of title; and, in the absence of contradictory evidence, will entitle an intervening claimant to bond the property seized by attachment.

The claim of a consignee, for advances, is superior to that of an attaching creditor, where the former had received the bill of lading previous to the attachment. But proof of such advances will not defeat the attachment of the latter, who will be entitled to any surplus after payment of the advances and necessary expenses.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Van Matre*, for the appellants.

Benjamin, for the intervenor.

GARLAND, J. This suit was commenced by attachment, to recover \$418 63 of Porter. The sheriff returned that he had attached, in the hands of the captain and owners of the brig Gleaner, the cargo of molasses on board, belonging to the defendant, which was afterwards released and delivered to Nathaniel D. Chamberlin, the intervenor, on his giving bond and security. As soon as the molasses was attached, Chamberlin presented his petition, alleging that he was entitled to the possession of it, because the defendant having shipped said molasses applied to him to make advances thereon according to the custom of merchants, and offered to transfer the same to him to be consigned to his (intervenor's) friends and correspondents in New York, whereupon he took the bill of lading and cargo into possession, and caused the molasses to be consigned to his correspondents, and thereupon advanced on the molasses \$7000 and upwards. He avers that by reason of the premises he is entitled to the possession of the molasses, that he may send the same to New York to be sold, and thus re-imburse himself for the advances he has made, and earn the profits and commissions resulting from the consignment. He, therefore, prays for a judgment ordering the cargo of molasses to be restored to his possession. On the day that this petition was filed, the intervenor took a rule on the plaintiffs to show cause, on the next day, why the cargo of molasses should not be delivered to him, on his giving bond and security to abide such judgment as the court might render against him in the premises.

On the return day of the rule the counsel who brought the suit for the plaintiffs appeared, and informed the court that he did not ap-

pear as their attorney to answer the rule, but to object to any proceeding or action under it: *first*, because the intervention had not been served on him or his clients; *secondly*, because there had been no legal or sufficient notice of the rule, it having been served on him only about eighteen hours previously, while the rules of the court required a notice of three days. These objections having been overruled, and the intervenor permitted to proceed, the counsel took his bill of exceptions. The inferior judge, in this bill, says that the notice was sufficient, as the rules of his court allow motions to be taken on short notice, in cases where the circumstances require prompt decision; and that he considered the present one of that kind, as the vessel had her cargo on board, and was ready to depart on her voyage.

The intervenor produced no other evidence of his having advanced any thing to the defendant, or of his possession of the molasses, than the bill of lading. The proceedings throughout have been conducted very hastily. After hearing the parties the court made the rule absolute, and ordered the molasses on board of the brig to be delivered to the intervenor on his giving bond and security in the sum of \$600, to abide the judgment that might be rendered against him in the premises, from which decision the plaintiffs have appealed.

The intervenor has moved to dismiss the appeal, on the ground that the judgment on the rule is not final, and does not produce any irreparable injury to the plaintiffs. As respects the possession of the property attached the judgment is final, as, from its nature and the place to which it has been sent, it is not at all probable that it will ever be in a situation to be restored to the sheriff or to the defendant. A judgment may be so far final as to be subject to an appeal, without being final as to the point at issue. 9 Mart. 519. In 6 La. 435, we said that to entitle a party to an appeal from an interlocutory judgment, it is not necessary that the injury be absolutely irreparable. It suffices if it be such as may become irreparable in consequence of the final action of the court. We think the appeal ought to be maintained.

As we before stated, the intervenor produced no evidence of title to the property, nor does he claim any. He states that he is entitled to the possession and the right to sell it, by himself or his

agents, for the purpose of re-imbursing his advances and expenses. The possession of a bill of lading, like the possession of a bill of exchange, is *prima facie* evidence of title, and is a strong circumstance to prove a right to the possession of the property.

In the absence of any contradictory evidence, it may be considered as a sufficient showing to enable an intervening claimant to bond the property attached. This court have held that the claim of a consignee for advances, is to be preferred to that of an attaching creditor, when the former had received the bill of lading previous to the attachment.

Should the intervenor show that he made the advances which he pretends to have done, it will not defeat the attachment of the plaintiffs, which will hold the surplus after discharging the prior advances and necessary expenses. 9 Mart. 297. 2 Mart. N. S. 104. 2 La. 494.

The counsel for the plaintiffs alleges that the bond affords his clients no security for their debt. We think otherwise. The condition is that the party shall abide such judgment as may be rendered against him. If the intervention be dismissed, then the judgment unquestionably will be, that the intervenor restore the property, or its value, to the amount of his bond, and this is all that the plaintiffs require. They do not take care of the defendant. If the intervention be sustained, and the claim established as alleged, the intervenor will no doubt be adjudged to account for the surplus of the proceeds of the molasses, and this is all the plaintiffs can get if the intervenor supports his claim to a lien. We do not see how the plaintiffs can be injured by the property being released on bond; and a large amount of costs may thus be saved.

Judgment affirmed.

PETER PAUL CLOSSMAN *v.* THEOPHILE BARBANCEY.

An action for the recovery of goods claimed by plaintiff as his property, which had been surrendered by an insolvent, against one who holds them as the syndic of the creditors of the insolvent, must be brought before the court in which the proceedings in insolvency are pending, and must be tried contradictorily with the creditors. Otherwise, were defendant sued in his private capacity for damages for unlawfully taking possession of the property of the plaintiff; such an action might be brought before any court of competent jurisdiction.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. The petition states, in substance, that in September last, one Charles Huberson being at Bordeaux, in the kingdom of France, had on hand a quantity of wines and other merchandize which he intended for the New Orleans market; that being in want of funds he obtained a loan from the plaintiff of \$5557 66, for which sum he drew in his favor a bill of exchange on himself, at New Orleans, payable sixty days after sight; and that to induce the plaintiff to make this advance, he endorsed in blank and transferred to him the bills of lading and invoices of the goods, which had already been put on board of the ship *Etna*, bound to New Orleans, and, moreover, executed, in duplicate, a writing by which he authorized plaintiff's agents at New Orleans to receive the goods, to sell a sufficient quantity of them to pay the draft even before it should fall due, and to pay over to him any balance in money, or deliver such part of the goods as might remain unsold. That, by consent, this arrangement was extended to and made to cover a further sum of \$1050, advanced to Huberson by the plaintiff; that the goods were accordingly consigned to the house of J. & L. Garnier, the plaintiff's agents, who entered them in their own names at the Custom House, gave their own bonds for the payment of the duties, and took possession of the goods.

The petition represents that at the request of Huberson, who had arrived at New Orleans, and had accepted the draft, J. & L. Garnier consented, in order to save expense, that he should look out for a cheap store, and should himself attend to the keeping and selling of the goods, in the same manner as a clerk of their own would have done, on his promising to make no credit sales

without consulting them, to account daily to them for cash sales, and to be in every respect subject to their orders and directions. That Huberson's draft having been protested for non-payment at maturity, J. & L. Garnier informed him that, pursuant to his written agreement with the plaintiff, they would sell a sufficient portion of the goods to pay the balance due for the advances made on them by the plaintiff, and for the amount of their bonds for duties, to wit, \$2249 39. That Huberson immediately applied to the Parish Court of this parish, made a surrender to his creditors of the goods in the store he had rented, and put the plaintiff on his schedule as an ordinary creditor for \$6062 90.

The petition avers that at the time of and before this surrender, the plaintiff, through his agents, had a qualified property in the goods, and was in the virtual possession of the same; and that Huberson abused the limited control which he had over the goods, for the purpose of defrauding the plaintiff; that with the view of promptly thwarting the intended fraud, J. & L. Garnier, as the agents of the plaintiff, procured a sequestration of the goods, and brought suit against Huberson. That from the pleadings, which were drawn up with some hurry and under an imperfect knowledge of the facts of the case, it might be inferred that the petitioners had only a privilege on the goods, whereas, in reality, they had the ownership and exclusive right of possession thereof, which could not be destroyed by the pretended cession of them by Huberson, and that the petitioners have discontinued said suit.

The petitioner further represents that at a meeting of the creditors of the insolvent, Theophile Barbancey was appointed their syndic, and that in said capacity he has taken possession of the goods which had previously been sequestered; that the possession of said Barbancey is illegal, and that he had no right to take the property as syndic, because the qualified ownership and exclusive right of possession thereof were in the petitioners, and could not be ceded by Huberson to his creditors.

The petition concludes with a prayer that Barbancey may be condemned to deliver the goods and merchandize to J. & L. Garnier, to be disposed of according to the agreement between the parties, on condition that, after paying out of the proceeds of the sale all the advances or charges on them, any balance of the price

of the goods, or any remaining portion of them in kind, shall be delivered over to the said syndic, &c.

To this petition various exceptions were filed. Of these it is only necessary to consider that which was sustained by the inferior judge, to wit: that the Parish Court, in which Huberson failed, has alone jurisdiction of this suit, against the syndic.

Benjamin, for the appellant,

Castera, for the defendant. The action should have been brought before the court where the surrender was made. *Syndics of Menard v. Peirce*, 3 Mart. N. S. 375. It is only by an opposition to the tableau of distribution that the validity and relative ranks of claims against an insolvent estate, can be finally settled. *Davis v. Heard*, 1 Mart. 207. *Grainer v. Devlin*, 1 La. 172. *Pandelly v. His Creditors*, 9 Ib. 393, 396.

MORPHY, J. It is said that the opinion of the Commercial Court is based on a misconstruction of the petition, and that this action is not brought against the defendant, as syndic, but in his private and individual capacity. From the plaintiff's own showing, and from all the proceedings before us, it is difficult to view this demand in any other light than as one against the creditors of Charles Huberson, represented by the defendant as their syndic. The record shows that the goods now claimed were put by the insolvent on his schedule and surrendered to his creditors; and that the present plaintiffs had the goods sequestered on the ground that they had a lien on the same, and that they had reason to fear their rights would be injured by the manner in which the property was used by Huberson. The sequestration having been set aside, the sheriff's return shows that the goods were delivered into the possession of the defendant, who, in the mean time, had been appointed definitive syndic. The latter prayed for the sale of the goods, whereupon two creditors, Cornet, and A. Grandgey, *frs*, who claim as vendors a privilege on some of these very goods, prayed that the portion respectively subject to their claims might be sold separately from the other property surrendered, in order that they might exercise their privilege on its proceeds. Under these facts it is clear that the true and only parties concerned in the demand of the petitioners, are the creditors of Charles Huberson, particularly those who assert their right to a privilege on the goods claim-

Oakey and others v. Duncan and another.

ed as vendors. It is only with them that the petitioners can try their claim as owners of the goods surrendered, or as creditors privileged thereon. As to the defendant, he holds the goods, not in his own right, but as the property of the creditors of Huberson, whose syndic he is ; and he can be sued for them only in the court which appointed him. It would be otherwise were he sued in damages for injury done to plaintiff in unlawfully taking possession of this property and selling it. Such an action could be brought against him in his private capacity before any court of competent jurisdiction, and he could not seek shelter under the pretence that he was a syndic. The decisions in 2 La. 200, 350, to which we have been referred, go no farther. It was there held that although the Marshal of the United States be not amenable to the State courts, in his official capacity, yet that if, in that capacity, he wrongs a citizen of the State, he will be individually answerable in damages in our courts. In this case, the object is not to render the defendant personally responsible for an act committed by him under color of his office, but to wrest from him and take out of his hands property which he holds as syndic, and on which there is evidently a conflict between the plaintiffs who have made advances on it, and other creditors who claim a privilege as vendors. The question whether the petitioners had such a qualified property in the goods in question as to prevent the insolvent from surrendering them to his creditors, must be tried contradictorily with the latter, and in the court where the insolvent proceedings are pending. Code of Pract. art. 165.

Judgment affirmed.

SAMUEL W. OAKEY and others v. LUCIUS C. DUNCAN and another.

The act of 22d March, 1826, relative to attorneys at law, applies only where the money belonging to a client has been withheld from him. It is inapplicable where the latter seeks to obtain the control of a note which had been received by the attorney.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

Duvigneaud, for the appellants.

L. C. Duncan and *G. B. Duncan*, *pro se*.

MARTIN, J. Oakey and others are appellants from a judgment discharging a rule which they had obtained against G. B. & L. C. Duncan, attorneys at law, to show cause why they should not pay to them a sum of about fourteen hundred dollars collected for them, and give them the full control of a note of about one thousand dollars made by Loze & Gradingo, and placed in their hands for collection by the plaintiffs, which they transmitted to Sweazey & Taylor for the same purpose ; and why they should not be immediately erased from the list of attorneys, their licenses canceled, and they adjudged forever incapable of appearing as such before any court in this State.

It does not appear to us that the court erred. The attorneys have fully established that they have paid all the moneys stated to have been received by them to the assignees of Agnew & Perry, creditors of the plaintiffs, in accordance with an arrangement to which it is sufficiently proved that the plaintiffs gave their assent. With regard to the control which they demand of the note of Loze & Gradingo, the plaintiffs have mistaken their remedy. The act of 1826, approved March 22, page 110, which alone authorizes the resort to the summary relief sought for by them, is confined to the cases in which a client's money is withheld from him by his attorney.

Judgment affirmed.

VICTOR MONTILLY v. HIS CREDITORS.

The privilege of the lessor on the moveables found in the house, yields only to that of the funeral expenses of the debtor and his family, and to that only when there is no other source from which it can be paid. The charges for selling the moveables, which, under art. 3223 of the Civil Code, are to be paid before the rent, are those only which are necessary or incidental to the sale of the moveables.

APPEAL from the District Court of the First District, *Buchanan*, J.

This case was argued by *A. Pilié*, for the opponents. No counsel appeared for the appellant.

Tait v. Lewis, Executor.

MORPHY, J. Several oppositions were made to a provisional tableau of distribution filed by the syndic in this case. The judge below acted only on those of François Reubreux and Pierre Lefebvre, whose claims, which are for house rent, will, if allowed, leave nothing for the other creditors of the assets thus far realized. The opponents claim the first privilege upon the proceeds of the moveables in their houses, subject only to the payment of the charges for selling the property. The syndic, who has appealed from the judgment allowing this privilege, contends that the expression, "charges for selling," used in article 3223 of the Civil Code, include all the law charges. Such a construction, it was properly remarked by the inferior judge, would entirely defeat the object of the legislator in giving a pledge to the landlord. This case is not to be distinguished from that of *Garretson v. His Creditors*, very recently decided in this court. 1 Robinson, 445. We there held that the privilege of the landlord on the moveables found in the house, yields only to the funeral expenses of the debtor and his family, when there is no other source from which they can be paid; that all other privileged debts are to be postponed to it; and that the charges to be deducted from the proceeds of the moveables must be limited to those incidental to, or rendered necessary by the sale of the property. Civ. Code, articles 3223, 3224, 3225, 3185, 3158, 3237.

Judgment affirmed.

BACON TAIT v. JOHN L. LEWIS, Executor.

An action may be maintained against an executor for a debt due by the succession, after a judgment recognizing the heirs and ordering them to be put in possession of the estate and homologating an account rendered by him, where it is not shown that the judgment recognizing the heirs and ordering them to be put in possession was ever executed or that the executor ever delivered up the property belonging to the succession, where the account appears on its face not to have been a final one, and there is no proof that the executor prayed to be, or ever was, discharged.

APPEAL by the plaintiff from a judgment of the Court of Probates of New Orleans, *Bermudez, J.*

GARLAND, J. This suit is founded on the same cause of action as one heretofore instituted by the same plaintiff, and decided in 18 L. R., 33. John L. Lewis, the only surviving executor of Henry De Ende being cited, appeared, and filed his exceptions to answering, viz :

First. That the time of his executorship has long since expired.

Second. That the heirs of the testator have been recognized, and put in possession of the whole succession.

Third. That he has presented an account of his administration, which has been approved and homologated by a judgment of the Court of Probates.

Fourth. That he has delivered over to the heirs of the testator all the funds and property in his hands belonging to the succession.

From the documents it appears that in February, 1837, one Stubbs presented himself to the Court of Probates, claiming to be the attorney in fact of the legal and testamentary heirs of Henry De Ende, and that the court being satisfied he had been so appointed, ordered that he be recognized as such, and his principals as the heirs ; and, further, that Lewis and Power, his co-executor, should render an account, within ten days, of their executorship, and that the heirs, by their aforesaid attorney, be put in possession of the succession. Sometime after this order, the executors presented themselves, protested against the interlocutory decree (as they call it,) recognizing Stubbs as the attorney of the legatees and ordering them to account, saying that they "herewith file their account and tender their bill ;" whereupon, on the 14th of April, 1837, the Judge of Probates ordered public notice to be given to the creditors of the succession, and personal notice to the heirs and legatees, to show cause why the account should not be homologated and confirmed. This account showed a balance of upwards of \$26,000 as owing by the executors, a considerable amount of property in their hands, and some notes not collected. They also stated that a suit for a large sum was then pending against them, that Francis De Ende's succession, and the natural children of their testator, have claims to a portion of the succession, which could not be then liquidated and settled, and that in consequence no final settlement could then be made. On the 30th of

July, 1838, it was ordered and adjudged that the account be approved and homologated.

It does not appear, from any evidence before us, that the judgment of the 20th of February, 1837, was ever executed by Stubbs, the attorney in fact of the non-resident heirs, by taking possession of the succession. The account rendered by the executors, does not purport, on the face of it, to be a final one. The order of the judge, directing public notices to be given, does not state or intimate in any manner, that the account is final, or that the executors had asked to be discharged; and in the judgment homologating it they are not discharged. From this judgment no appeal has been taken.

The counsel for the defendant have based their whole argument to show that the executor is discharged, on article 1003 of the Code of Practice, and articles 1197, 1666, 1667, and some others of the Civil Code. If it had been shown that the judgment of the Court of Probates, authorizing Stubbs to be put in possession of the estate, had been executed, and thereby, some one authorized to represent the estate when demands should be presented against it, there would have been much force in the application of the article 1003 of the Code of Practice; but it is not to be permitted to the heirs of a succession, or to their agents, to take partial steps towards taking possession of an estate, and thereby take a position from which they can keep the creditors out of their rights, by playing them off on the executor, and he in turn throwing them back upon the heirs. There is no evidence in the record that Stubbs ever was in possession of any portion of the succession, and it is certain that the executors did not consider that they were rendering a final account of their administration.

It seems to have escaped the attention of the counsel for the defendant that the provisions of the Code, in relation to the tenure of office of executors, administrators, curators, &c., have been materially modified by the act of the legislature of March 13th, 1837, which provides that those persons shall render annual accounts of their administration, but shall continue in office until the estate is finally wound up, any law to the contrary notwithstanding, upon condition of giving additional security if the Judge of Probates shall deem it necessary for the interest of the estate or of

Succession of Charles Morgan—Morgan and another, Executors, Appellants.

the creditors. Bullard & Curry's Dig., p. 3, sec. 6, 7. The account of the executors, it would seem from the date, was filed with special reference to this law; and the judgment of homologation rendered July 30th, 1838, confirms the impression.

There is no evidence before us to prove that the executors ever paid any part of the sum admitted to be due, to Stubbs or to the heirs of De Ende. It is true that an account was rendered in April, 1837, by the executors, but it does not appear to have been a final one, nor intended to discharge them. It was the annual account required by law. The heirs of De Ende were recognized and ordered to be put in possession, but that judgment is not shown to have been executed in any manner; the term of the executor has not, therefore, expired, as the estate is not, in the words of the statute, "finally wound up."

The judgment of the Probate Court is, therefore, reversed, the exceptions of the defendant overruled, and the cause remanded with directions to answer to the merits. The costs of the appeal to be paid by the appellee.

G. Strawbridge, for the appellant.

Roselius and Preston, for the defendant.

SUCCESSION OF CHARLES MORGAN—MATHEW MORGAN and another, Executors, Appellants.

Heirs of full age may make an extra-judicial partition of the property coming to them.

So the legatees may compound, or give a valid discharge.

A testator, owing no debts, directed his property to be turned into cash, and bequeathed the residuum, after the payment of certain legacies, to a trustee for the propagation of the Christian religion. The heirs and legatees, being all of age, and the trustee, for the purpose of saving expense and to avoid a sale of the property at an unfavorable period, agreed to a division in kind, and the executors prayed that an account and partition, made in conformity to such agreement, should be homologated, and the decree taken as a final settlement and partition of the estate, to which no opposition was made. *Held*, that the heirs had a right to enter into such a compromise; that the trustee, being responsible only to the heirs for the manner of executing the will of the testator, was authorized, by their consent, to agree to the arrangement; and that the compromise, not being one reprobated or prohibited by law, should be carried into effect.

Succession of Charles Morgan—Morgan and another, Executors, Appellants.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

This case was submitted, without argument, by the appellants, and by *L. C. Duncan*, for the absent heirs.

BULLARD, J. The executors of the last will of the late Charles Morgan presented their petition to the Court of Probates, representing that they had submitted to the persons interested, who reside in New York, the inventory of the estate duly approved by the court, as also their account of their administration, which account they file with the petition, which was approved, and the approval certified under the proper signatures of the parties, with an acknowledgement of full payment of all the legacies contained in the will, together with full releases, exonerating the executors from any further trust in relation to the estate. They further represent and show that the widow, heirs, and legatees, and all persons interested in the estate, who are proved to be of full age, together with their acknowledged agent in this State, have expressed their willingness and desire that said account should be homologated and approved by the Court of Probates, and that the decree of the court homologating and approving said account should be taken and considered as a decree of partition and final settlement of the estate of said Charles Morgan situated in the parish and city of New Orleans, and that the titles to the different pieces of property detailed in the inventory be adjudged to be vested as set forth in the said settlement and partition.

Upon presenting this petition, it was ordered that public notice be given to the creditors of the succession and all others interested, to show cause why the account filed by the testamentary executors should not be approved and homologated, the funds distributed in accordance therewith, and the executors discharged from all further trust and liability in the premises.

It appears that the publications were made accordingly, and that no opposition was made from any quarter. The executors then moved the court for a judgment homologating the account rendered, and the partition among all persons concerned. But the court being of opinion that the executors had totally disregarded the will of the deceased, and that, "instead of selling the property of the succession, as directed by the will, to make *certain* the

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legacy of the residuum in favor of the *imaginary being*, the religion and church of Christ within the United States, they were applying to the court for their discharge and the conveyance to themselves of a full and complete title to the property of the succession, in virtue of a compromise or transaction with the Rev. Manton Eastburn, to whom they erroneously give the title of universal heir of the deceased," refused to homologate and approve the account, except as to the debit side from No. 1 to 13 inclusive; but ordered a lot of ground, specially bequeathed to the widow, to be delivered to her, and refused to discharge the executors, whereupon they appealed.

The testator, by his will, disposed of the residuum of his estate, after paying certain legacies, to religious purposes, and appointed the Rev. Manton Eastburn his trustee for the application of the fund to the uses for which it was destined. The vouchers filed with the petition show that the heirs, executors, and trustee, in order to save the loss and expense of reducing the whole estate into money by a sale at a time when real property is much depreciated, agreed that the property should be taken to be of the value set forth in the inventory approved by the Court of Probates; that the money legacies should be paid; and that the residuary legatee, instead of requiring a literal compliance with the terms of the will, should receive the sum of \$15,000 as the residuum coming to him for the charitable uses designed by the testator. All parties consented to this arrangement, as well as the two executors, who are, at the same time, heirs of the testator. Their capacity to enter into such a compromise, and to agree to a partition of the property in kind among the heirs, cannot be doubted. The only possible doubt which could arise, would relate to the authority of the trustee to consent to accept a certain sum, in lieu of such residuum as might be paid over to him by the executors after causing the whole property to be reduced to cash. But to whom is the trustee responsible for the manner in which he performs the trust? To the heirs of the testator alone, who have a right to require of him to apply the fund faithfully. The religion and church of Christ, for the propagation of which the legacy was intended, have no faculty *standi in judicio*. It is to the heirs of Morgan alone that the trustee is to account, as they alone have

Saulet v. Trépagnier.

a right to supervise his proceedings. The only question, therefore, is, whether such a compromise, among all the parties of age and capable of acting for themselves, be reprobated or forbidden by law, so as to make it the duty of the Court of Probates to interfere, *ex officio*, and refuse its sanction to the proceedings. The right of heirs of full age to come to a partition extra-judicially, has never been disputed; and the right of legatees to compound and to give a valid discharge, is equally clear. We cannot concur in the conclusion to which our learned brother of the Court of Probates has come, that it is the duty of the court to refuse its sanction to an arrangement not forbidden by law, and in which we see nothing immoral, unless it be so to rescue property from the vortex of administration, and by saving unnecessary expense, preserve the rights of the heirs, at the same time that the pious wishes of the testator are accomplished, and probably a larger sum saved for those purposes than if a sale had been made in literal compliance with the terms of the will.

It is, therefore, ordered that the judgment of the Court of Probates be reversed, and that the account rendered by the executors and approved by the heirs and legatees, be approved and homologated, and that they be discharged as executors. And it is further decreed that the settlement, liquidation, and partition of the estate of Charles Morgan, deceased, as set forth in the vouchers on file and in the petition, be, and the same are hereby approved and homologated; and that the costs be paid out of the estate.

FRANÇOIS SAULET V. PIERRE TRÉPAGNIER.

The sale of a tract of land described as having seventeen *arpens* front on the river, by a depth determined by the titles, bounded on the upper side by the plantation of D., and on the lower by that of L., is a sale *per aversionem*; and having been made with reference to known and definite boundaries, conveys nothing more than is contained within those limits, and a deficiency in quantity will not entitle the purchaser, either to a rescission of the sale, or to a diminution of the price. C. C. 2471.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, for the plaintiff.

L. Janin, for the appellant.

MORPHY, J. The defendant is sued for a balance of \$15,000, on a note of \$18,000, the last instalment of the price of a plantation sold to him by the plaintiff on the 27th of January, 1829. After admitting the sale and the execution of the note, the defendant avers, that the plantation was warranted to contain seventeen *arpens* front, and to run back to lake Pontchartrain, agreeably to title papers which the plaintiff represented he had in his possession. That the plaintiff had no title at all to one *arpent* front with the depth so conveyed, and that selling it agreeably to title papers which he had not, he was guilty of fraud towards him. That for the portions to which the plaintiff had titles running to the lake, there are other and better titles covering the same land, so as to prevent him (the defendant) from getting much the greater part of the land thus sold. The defendant further avers, that he agreed to pay for the plantation and the slaves employed on it \$130,000, which sum he has paid, except the amount yet due on the note sued upon; but that for the reasons and frauds aforesaid, he is entitled to a reduction of fifty thousand dollars upon the price paid, which he pleads in compensation and reconvention. The case was laid before a jury. The plaintiff having obtained a verdict and judgment, the defendant moved for a new trial, failing to obtain which, he has appealed.

The act of sale, after reciting the various titles by which the vendor had acquired the several tracts forming the whole plantation, proceeds as follows: "*Ce qui compose bien l'habitation mentionnée aux présentes de dix sept arpens de face au fleuve, sur une profondeur qui sera déterminée par les titres, ce qui agrée à l'acquéreur, bornée dans sa partie supérieure par l'habitation Dieu-donné et Similien LaBranche, et dans sa partie inférieure par celle de Mde. Vve. Delhommer.*" From these expressions used by the vendor, we take the sale to be one *per aversionem*, under the repeated adjudications of this court. When a sale is made with reference to known and definite boundaries, nothing more is intended to be conveyed than what is contained between the given boundaries, and a deficiency in quantity does not entitle the purchaser to demand either a rescission of the sale, or a diminution

of the price. 5 Mart. N. S. 241. 8 Idem, 159. 3 La. 91. 4 La. 535. 7 La. 455. 16 La. 186. Civ. Code, art. 2471. As to the depth of the land sold, it does by no means clearly appear that the plaintiff intended to sell, or did sell a plantation extending to lake Pontchartrain. The deed of sale does not say so. From the courses of the side lines, which were well known to both parties, they must have been aware that the lines closed at some distance from the river. From the language used, the depth of the land seems to have been a matter of uncertainty, left to be determined by the titles, such as they were; and all the title papers are proved to have been handed over to the defendant at the time of the sale. These are not to be found in the record, and we cannot know whether they mention anything about the depth of the land; but a confirmation by the United States was produced by the defendant, in which the land is mentioned as a part of a tract of twenty-one *arpens* front, stated by two witnesses to have been granted by the Spanish Government to the widow Grondel, and to extend to the lake. Notwithstanding this enunciation in the confirmation, it was not doubted by the jury, nor can we doubt that the purchaser knew perfectly well that the land he was buying did not extend to the lake. The evidence shows that the side lines of the plantation are not parallel, that they approach a good deal, and that a large portion of the rear is cut off by the lines of adjoining plantations, which intersect those of the defendant at a distance represented to be about seventy *arpens* from the river. The plantation sold, and the adjoining ones have been settled and laid out for a number of years, with fences on each side, marking the dividing lines between them; and several witnesses say that these fences or lines have never been changed, and that they have always known them to exist as they now stand. The defendant, who was well acquainted with the plantation, having always lived in its immediate vicinity, where he was born, took possession of it in January, 1829, and regularly paid up his instalments without complaint. Two surveys of the land took place after the sale, one in July, 1829, and one in April, 1833. The latter, which has been given in evidence, was made by L. Bringier, at the request of, and in presence of the defendant. It shows the courses of the side lines, which close so as to give only a width of about six

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arpens at forty *arpens* from the river. The defendant made no objection, and appeared to be satisfied. On the 3d of May of the following year, when the note sued on became due, he paid on account of it \$1500, with one year's interest, and on the 1st of May, 1835, he paid a further sum of \$1500, with interest on the balance up to the 5th of May, 1836. No further payments having been made, this suit was brought for the balance due. Under all these circumstances, the jury thought that there was no fraud as alleged by the defendant; that he bought with reference to boundaries, the course and situation of which were well known to him; and that, therefore, he was not entitled to any diminution of the price. We cannot say that they erred.

Judgment affirmed.

HENRY S. BUCKNER and others v. JOHN L. CHAPMAN.

A commission of two and a half per cent for accepting a draft or bill, where the drawer has no funds in the hands of the drawee, is a fair compensation for the use of the name and credit of the latter. But where such a commission has been charged, none can be allowed for afterwards paying the draft.

Conventional interest can be recovered only where there has been an agreement, in writing, to pay it.

Interest cannot be allowed on the items of an open account, unless a balance has been struck.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. This action was commenced for the recovery of the sum of \$1,443 88, a balance of accounts, alleged to be due to the firm of Buckner, Stanton & Co. in New Orleans, and Stanton, Buckner & Co. in Natchez, the two firms being composed of the same individuals. The petition states that the plaintiffs are factors and commission merchants, that the defendant is a planter in Mississippi, and was at one time connected in the business of planting and merchandize with one Tarleton, which partnership is now dissolved, and the defendant, by agreement, responsible for all the debts. The claim is made up of a balance due on various

drafts drawn by defendant on the plaintiffs and paid by them, with charges for interest at ten per cent per annum, of commissions at two and a half per cent for accepting the drafts, and of two and a half per cent for paying them when not furnished with funds by the defendant.

The first answer of the defendant was a general denial; but on the trial he admitted the account of the plaintiffs, except as to the items of interest, and a credit of \$1755, which he alleged ought to have been \$2700. On the trial the plaintiffs had a judgment for \$216 11, with legal interest. They were dissatisfied with this judgment, and asked for a new trial, which was granted by consent; the defendant having leave to amend his answer. The defendant then amended by averring that on a full and fair settlement of all their accounts, the plaintiffs would be indebted to him. He admits that the firms in Natchez and New Orleans were composed of the same persons, and avers that the accounts of both firms with himself and Tarleton, were blended together, or separated, or transferred by the plaintiffs to each other, as suited them. That in their accounts the plaintiffs have made unjust and illegal charges against him, to wit, those for two and a half per cent for commission for accepting drafts, for interest at the rate of ten per cent per annum on said drafts or advances, and for two and a half per cent commission for paying drafts when their funds were used for the purpose, and two and a half per cent commission on the balance claimed.

The defendant further avers that, on the 12th of December, 1838, not knowing how his accounts stood with the plaintiffs, and being solicited by them, he gave them \$1000 in notes of the Union Bank of Mississippi, and his own and John Trumbull's joint note, payable at the Merchants' Bank in New Orleans, twelve months after date, for \$3300, which was all to be placed to his credit; but that such has not been the case, as they only give a credit for \$950 for the \$1000 paid, and still retain the note, which was given without any consideration. He therefore prays, to plead in reconvention his demands against the plaintiffs; asks for a full and final settlement of all accounts, on which he says the plaintiff will be at least \$5000 in his debt, for which he prays judgment, and also that his note for \$3300 may be surrendered to him.

On the trial, the accounts rendered by the plaintiffs to the defendant were produced. They are made up, with the exception of a few items, of charges for drafts drawn upon the plaintiffs and paid by them, for which they charge two and a half per cent commission for accepting, two and a half per cent commission for paying, ten per cent per annum interest on the amount of the drafts and the commission, and a commission of two and a half per cent on what is called the cash balance, and of various credits for money received as the proceeds of cotton sold and drafts drawn by Chapman on other persons, or those of other individuals which had come into his hands and been transferred to the plaintiffs; the whole showing a series of charges and extortions, which we hope, for the mercantile character of New Orleans, is without a parallel, although one witness testifies that such charges are customary among commission merchants.

There was no dispute between the parties, as to the drafts drawn by defendant on the plaintiffs, and paid by them. The items in contestation are the charges for commissions for accepting and paying drafts, for interest at ten per cent on the amount of the drafts and commissions, and two and a half per cent commission on cash balances, and two items, of \$2700 and \$1000, which the defendant says he should have credit for in full, while the plaintiffs aver that they have given the proper credit for those sums.

The judge of the District Court allowed the charges of two and a half per cent commission for accepting, and two and a half per cent commission for paying drafts, when not in funds. He allowed interest on the items on the debit and credit sides of the the account, rejected the compound interest and commissions on cash balances, and allowed the defendant credit for the sums of \$1000 and \$2700 in full, which left a balance in his favor, of \$946 68, for which sum he gave judgment against the plaintiffs, on the defendant's demand in reconvention, and the former have appealed. In this court the defendant has prayed for an amendment of the judgment, alleging that a much larger sum is due.

Upon the question of commissions for accepting a draft or bill where the drawer has no funds in the hands of the drawee, this court said, in the case of *Segond v. Thomas*, 10 La. 295, that it was a fair compensation for the use of the name and credit of the ac-

ceptor, and in the case of *Taylor, Gardiner & Co. v. Wooten*, 19 La. 518, the principle was re-affirmed; but we then determined that no commission for paying a draft should be allowed. We are now fully satisfied of the correctness of that opinion. The judge, therefore, erred in allowing the plaintiffs a commission of two and a half per cent, for paying the drafts of defendant which had been accepted by them.

As to the charge of interest at the rate of ten per cent per annum, the judge of the District Court was right in disallowing it. This is the highest rate of conventional interest allowed by law, and it is now too well settled to admit of a doubt, that interest at that rate can only be recovered, when fixed by the parties in writing. But the judge erred in allowing interest at the rate of five per cent per annum, on the other items of the account. We know of no law which authorizes such a charge. The accounts between the parties were such as usually exist between a factor and principal, in other words an open running account of debit and credit. No interest can be allowed on such claims, unless it be on a balance struck.

As to the sum of \$2700, we are of opinion that the defendant is entitled to a credit for the full amount of it. The amount was remitted to the plaintiffs in Natchez, in notes of the Brandon Bank. In his letter of the 23d of July, 1838, the defendant tells them to place that amount to his credit. He says his debt was contracted with the house at Natchez, and that Buckner had agreed to receive it in Mississippi bank paper. The sum was at first credited on the books of the plaintiffs at Natchez, in full, but afterwards the house in New Orleans reduced it thirty-five per cent, so as to bring it to the standard of New Orleans bank currency. This they had no right to do, without the consent of the defendant. Shotwell, a witness for the defendant, says that he wrote to the plaintiffs in Natchez, informing them, if they would not take the money at par, to return it. They say that they never received his letter, but they received that of the defendant, and they did not inform him that they would not take those bank notes at par, or that they intended to charge a discount on them; and the discount of 35 per cent was not, in fact, charged, until sometime afterwards.

As to the credit of \$1000, the defendant is not entitled to it. It was paid in notes of the Union Bank of Mississippi to the house of the plaintiffs at Natchez, and in the receipt given they say that the whole is to be placed to his credit; yet the house in New Orleans reduced the amount \$50, so as to reduce the Union Bank notes to the standard of New Orleans funds, which was a positive contradiction of the terms of the receipt, and without the consent of the defendant. The counsel for the plaintiffs urges, that the defendant is bound by the charge made by the plaintiffs, because on the first trial in the District Court the counsel for the defendant admitted that the account sued on was correct, with the exception of the items in relation to interest and the discount on the Brandon Bank notes. In the account so admitted to be correct, the defendant is charged with the discount of five per cent on the Union Bank notes, and credited with the sum of \$950 only. We feel bound to give the effect to this admission as far as it goes, and the judge, therefore, erred in allowing a credit for \$1000, as the defendant had admitted that \$950 was the proper sum.

The counsel for the plaintiffs also urges that, by the admission above stated, the defendant is precluded from contesting the items of commission charged in the different accounts. We do not think the admission goes so far. An examination of that account shows that no item for commission is contained in it, nor was the charge for commissions then in contest. The controversy in relation to them arose on the filing of the defendant's amended answer and plea in reconvention, which was filed by consent of the plaintiffs' counsel, after the defendant had consented to a new trial.

As to the note of \$3,300 given by the defendant and Trumbull to the plaintiffs, it is clear it was not considered as a settlement of the accounts between the parties. The plaintiffs have not given the defendant any credit for it, as they state in their receipt that they will do. On the contrary, they sue for the balance of their account, accruing before the note was given, without saying any thing about it. It is scarcely to be credited, that the plaintiffs would have sued for the balance of an account, when they had in their possession a note closing it or covering a large part of it.

The judgment of the District Court is, therefore, amended as prayed for by the appellee; and a judgment is given in favor of the

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said John L. Chapman, on his demand in reconvention, for the sum of nine hundred and ninety-seven dollars, and ninety-five cents, with legal interest from the 29th of May, 1840, until paid, with costs in both courts.

This case was submitted without argument, by *L. C. Duncan*, for the appellants, and *Chinn*, for the defendant.

STEPHEN BOULLEMET v. ALEXANDER PHILIPS.

To recover in an action of slander, malice in defendant must be proved.
The verdict of a jury will be set aside when contrary to the evidence.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. The defendant is appellant from a judgment on a verdict for the sum of four thousand dollars, in an action of slander. The words charged in the petition are, that the plaintiff's family are not white, meaning that he was a colored person; and, farther, that his mother was a colored woman and of mixed negro blood. The plaintiff avers that his mother and all his family are, in fact, white persons. The words charged were proved to have been spoken by the defendant; but no circumstance was shown, from which it might be inferred that they were spoken with the least degree of malice. A crowd of witnesses have been introduced on each side, nearly equal in number, and, as far as we can tell, in means of knowledge and in respectability. Those of the plaintiff uniting in the expression of their opinion that the plaintiff's mother was white, or at least of Indian descent, and that she kept company with white ladies. The witnesses introduced by the defendant, equally unite in the opinion that she was a colored woman, the *ménagère* for several years of the plaintiff's father, who afterwards married her; that her brother and some other children were considered as colored persons; and that she never associated with white ladies. One or two add that her children were excluded from a school to which they had been sent, on the ground that they were not white boys, and that some of them were hired out at ten dollars per month as colored people. On the ques-

tion of fact, a close examination of the evidence has left the impression upon our minds that the plaintiff has hardly succeeded in making that probable, which the law requires him to make certain. Had he succeeded in complying with the requisites of the law in this respect, he would not, in our opinion, have been entitled to a verdict, unless he had shown malice in the defendant, which is the essence of the action of slander. We must add to this, that there is no evidence that any cause of enmity existed between the plaintiff and defendant, which might induce the latter to seek to injure the former.

Our learned brother of the Parish Court charged the jury, on the authority of Starkie, part 4, page 867, that "malice, in cases like the present, is an essential ingredient; for if it appear that the words, though slanderous, were spoken wholly without malice, and of this the jury are to judge, the defendant will be entitled to a verdict." From this quotation he appears to have concluded that, as the jury were the judges of the malice, and they had found a verdict against the defendant, he was bound to infer that they had found the malice; and, when moved for a new trial, he doubted his right to touch their verdict, although he informs us that he did not, in any way, agree with the jury in their finding, for his views of the evidence totally differed from theirs. Sharing with him his dissatisfaction with the finding of the jury, and our views of the evidence, like his, totally differing from theirs, we are bound to remember that the verdict of a jury must be set aside when contrary to the evidence, as we held in the case of *Rousseau v. Chase*, 2 La. 497. Being then of opinion that the evidence offered by the plaintiff "ought to have been satisfactory to any man not disposed to quibble, and being unable to find any just grounds on which the verdict and judgment in the court below could stand," we reversed the judgment, set aside the verdict, and gave judgment for the defendant. Accordingly, in the present case, seeing no evidence to show malice in the defendant, it is our duty to relieve him.

It is therefore ordered, that the judgment be reversed, the verdict set aside, and the cause remanded for a new trial, with directions to the judge in the trial thereof to conform to the principles

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herein established, and otherwise to proceed according to law ; the plaintiff paying the costs of this appeal.

Peyton, for the plaintiff.

Roselius, for the appellant.

BENJAMIN F. CURTIS and another v. SAMUEL MOSS and another.

Action against defendants as sureties on a prison bounds bond, signed by them but not by the principal: *Held*, that the bond was incomplete until signed by all the parties intended to be bound, and that until so signed either might repudiate it ; that being a contract of suretyship, it could not exist without the correlative obligation of the principal ; and that were the defendants to pay the amount of the bond, they would not be subrogated to the rights of the plaintiffs against their debtor, as they were not bound with or for him. Suit dismissed.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Hoffman, for the appellants.

Benjamin, contra.

MARTIN, J. The plaintiffs are appellants from a judgment dismissing their suit on a prison bounds bond, signed by the defendants, sureties of the debtor in the execution, but not by the latter. The bond purports to be the evidence of a contract between Samuel L. Moss, the defendant in the execution, and the present defendants, his sureties, and the sheriff in whose hands the plaintiffs had placed a *ca. sa.* against their debtor—a contract which was inchoate until the bond was signed by all the parties intended to be bound thereby, and which until so signed by all, could be repudiated even by any of those who had clothed it with their signatures. See *Villeré et al. v. Brognier*, 3 Mart. 349. But the present case is still stronger. The defendants intended to enter into a contract of suretyship ; and the obligation cannot exist without the correlative one of a principal obligor. Samuel L. Moss, the debtor, was under no legal or moral obligation to remain within the prison bounds, until he had been legally placed therein on the execution of the bond required by law. Were the defendants to pay the amount of the bond, they would not be legally subrogated to the rights of

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the plaintiffs against their debtor, because they are not bound with or for him. Other points have been raised, but the one just now considered is of such vital importance in the case, that it would not be at all material to examine the others.

Judgment affirmed.

ANDRÉ DUSSUMIER v. EUGENIE COIRON.

A married woman, not separated in property, cannot accept the office of testamentary executrix, without the consent of her husband, C. C. 1657; nor can she, after acceptance, appear in court in the execution of the trust, without the authority and assistance of the latter. The cases provided for by arts. 125 of the Civil Code, and 106 of the Code of Practice, are the only exceptions to the general rule prescribed by art. 123 of the Civil Code, that a wife cannot appear in court without the authorization of her husband.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

MORPHY, J. The defendant, who is at the same time universal legatee and testamentary executrix of the late widow Cotteret, has been sued in both capacities, and has been decreed to pay to the petitioner a sum of \$400, for services rendered to the deceased. From this judgment she has appealed, and prays for its reversal on the ground, among others, that her husband, François Ste. Marie Coiron, has not been made a party to the suit, and that she has not been aided and assisted by him in making her defence. The petition does not pray that the husband be cited to defend the suit with his wife, the defendant, nor did he join in the answer she made to it. The appellee's counsel has suggested that, perhaps, no authorization of the husband is necessary, where the wife sues or is sued in the capacity of a testamentary executrix. Even if any doubt could exist as to the necessity of the marital authorization in such a case, it would be of no avail here, as the defendant is also sued, in her individual capacity, as universal legatee. But the law, we apprehend, makes no distinction. The Civil Code, art. 123, provides, that "the wife cannot appear in

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court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband."

The only exception, we know of, to this general rule, is to be found in article 125 of the Civil Code, and in article 106 of the Code of Practice, to wit, when there exists between the husband and wife a separation from bed and board. Article 118 of the Code of Practice provides, that "when one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought both against her and her husband." The office of testamentary executrix cannot be accepted by a married woman, without the consent of her husband. Civ. Code, art. 1657. If, in the execution of this trust, it becomes necessary for her to appear in court, either as plaintiff or as defendant, she must, we think, under the provisions of our law, be authorized and assisted by her husband; and all proceedings had and conducted without such authorization, are null and void.

It is therefore ordered, that the judgment of the Court of Probates be avoided and reversed, and that this case be remanded for further proceedings; the plaintiff and appellee paying the costs of this appeal.

Castera, for the plaintiff.

Ducros, for the appellant.

JAMES M. MALONE v. JOHN B. BARKER and another.

There is nothing in the laws of this State to prevent property from being held in trust for the use of another, where all parties interested assent; and such a naked trust, to be executed within a reasonable period, does not amount to a substitution. A trustee, who claims property in this State, under a deed of trust executed in another for the benefit of a third person, will not forfeit his rights thereto by granting a delay to the debtor, any more than a mortgage creditor by giving time to his debtor.

APPEAL from the District Court of the First District, *Buchanan*, J.

GARLAND, J. The plaintiff alleges that he is the owner of a female slave named Frances, and her child George, and that the

defendants illegally retain possession of said slaves, pretending to have a title to them. It appears that Isaiah D. Fuller, to whom the slaves once belonged, on the 1st of May, 1835, gave his promissory note to one Robert A. Douglass for \$6,215 50, payable thirty months after date, which note was subsequently assigned to Abraham Douglass, and that on the 7th of October, 1837, Fuller made an instrument in writing, commonly called a deed of trust, whereby he conveyed to the plaintiff the slave Frances, with several others, and a variety of personal property. The deed purports to convey a full title, recites the execution and transfer of the note, and then states that the conveyance is made "in trust, however, and to the intent and purpose that if the said promissory note, herein before mentioned, shall be and remain unpaid on the 1st of January, 1839, then he, the said Malone, shall proceed to sell and dispose of, at public sale, for cash, all the personal property hereby conveyed, giving ten days previous notice thereof, in some newspaper printed in the city of Mobile, and with the money arising from the sale, after deducting his reasonable costs and charges, shall pay and satisfy the said note;" and any surplus that may remain is to be returned to said Fuller. Various credits are endorsed on the note, appearing to be the proceeds of the property conveyed, which, with the exception of two slaves, was sold before the time specified in the trust. The plaintiff alleges that more than \$2000 is yet due on the note. Neither the note nor deed of trust appears to have been executed in the presence of witnesses, nor did the endorsee or payee of the note sign it; but the instrument was admitted by Fuller and Malone, in the presence of a notary, to have been executed by them, and on his certificate of the fact, it was recorded in the office of the clerk of the County Court of Mobile county, Alabama, where Fuller resided.

The facts that George is a child of Frances born since the execution of the deed of trust, that the woman is the same mentioned in it, and that she belonged to Fuller, are admitted or fully proved.

On the 1st of October, 1838, Frances was sold by the sheriff of Mobile county, (George not having been then born,) under an execution against Fuller, Garner & Co., of which firm J. D. Fuller was a partner, to Jane Remgeard. It does not appear that any thing was said at the sale about the deed of trust, either by Fuller,

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the sheriff, or by any other person. The purchaser took possession of the woman, and sometime after, sold her to Wood, who afterwards sold her to H. Gates, from whom, in April, 1840, she was purchased, with her child, through an agent, by Joshua Baker of the Parish of St. Mary, under whom the defendants hold possession, and defend this suit as his agents.

The answer of the defendants sets up the different conveyances under which they hold, all of which are in the record. They allege and prove a purchase in good faith for a fair price; and the agents of Baker swear that when he made the purchase he did not know of the existence of the deed of trust, which it is alleged is collusive, simulated, and fraudulent, and that the plaintiff is a party to the fraud.

On the trial, in addition to the foregoing facts, it was proved that such deeds as the one before us, are recognized by the laws of Alabama, and held sufficient to vest a legal title in the property conveyed. That when executed under seal and recorded, they import a consideration, and are valid against third persons, unless a *prima facie* case of fraud is made out; nor is it considered necessary that the trustee should have possession of the property. It was further shown that Fuller and Abraham Douglass, the assignee of the note, and the person to be benefited by the trust, are brothers-in-law. In January, 1839, when some of the negroes mentioned in the deed were sold by the trustee, as it is pretended, A. B. Carver, a witness for the plaintiff, says that he bid in two, named Isaac and Salina, in the name of James D. Fuller, who is a son of Isaiah, the grantor in the deed, and about nine or ten years old. He says that he did this at the request of Isaiah D. Fuller, the father; that no money was paid; and yet we find on the back of the note a credit for \$1220, the price of these two slaves, signed by Carver, as agent for Abraham Douglass, from which it would appear that he (Carver) had possession of the note at the time; and yet he swears that he was, at that time, the clerk of Fuller, the drawer of it.

The District Judge gave judgment for the defendants, on the ground that the plaintiff had forfeited the title vested in him by the deed, by his failure to proceed immediately to the execution of the trust; from which judgment he has appealed.

It seems well settled in the State of Alabama, that such a conveyance as the one under consideration, vests a legal title in the trustee, upon which he can recover the property in a court of law from one holding without title, or otherwise claiming an illegal possession. We have also held that there is nothing in our laws which prevents property from being held in trust for the use of another, when all the parties having an interest assent; and that such a naked trust, to be executed in a reasonable period, does not amount to a substitution. 5 Mart. N. S. 302. 4 La. 213. Conveyances of this description are used in other states of the Union, for the same purposes, generally, that the contract of mortgage is with us; and we see no more reason why a trustee should forfeit his right to the property conveyed to him, by not promptly executing the trust, than a mortgage creditor should lose his privilege on the property mortgaged by giving a delay of a year or more to his debtor, and letting the property remain hypothecated. We think the judge erred in supposing that, by the non-execution of the trust, the plaintiff lost his right to the property. But if the principle assumed were correct, the evidence in this case would not sustain its application, as it appears that the plaintiff did endeavor to sell the property conveyed, and the defendants in their answer allege that he had sold it; but there is no evidence that the sale was ever completed. By the terms of the trust the plaintiff was not authorized to proceed under it previous to January 1st, 1839. Within three weeks after that time, it appears that two of the slaves were sold to Fuller's infant son, and a large portion of the other property seems to have been sold before that period. The fact is that the manner in which the trust appears to have been executed, has excited a strong suspicion in our minds that every thing in connection with it is not entirely fair. Previous to January 1st, 1839, the plaintiff, as trustee, had no right to sell the property at all; yet we find credited on the note, the proceeds of the sale of different portions of it, made previous to that date. The understanding which seems to have existed between the parties in relation to the disposition of the property, the sale to the infant son of Fuller, the possession of the note by Carver the clerk of Fuller, the credit on it without any money being paid, and the fact that the slaves now in contest

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were seized and sold by the sheriff of Mobile without objection, and remained one year and a half in that city, all go to make out such a *prima facie* case of fraud and simulation, as makes it imperative on us to call on the plaintiff to show the fairness of the whole of his transactions in relation to this matter, the consideration of the note from Isaiah D. Fuller to Robert A. Douglass and of its transfer to Abraham Douglass, the connection of the plaintiff with Isaiah D. Fuller, Robert A. Douglass and Abraham Douglass or either of them in business or otherwise, and also with the firm of Fuller, Garner & Co., the cause of the deed of trust being made, and why there were no witnesses to it, why the other property mentioned in the deed has not been sold and its proceeds applied to the payment of the note, why no money was paid for the slaves Isaac and Salina sold to John D. Fuller, and if any was paid, who paid it.

The judgment of the District Court is therefore annulled, and the cause remanded for a new trial, with directions to the judge to require evidence from the plaintiff to explain all of the aforesaid transactions, and otherwise to proceed according to law ; the defendant paying the cost of the appeal.

Vason, and P. W. Farrar, for the appellant.

Micou, contra.

ROBERT HEATH v. ROBERT STILSON. .

APPEAL from the District Court of the First District, *Buchanan, J.*

W. W. King, for the plaintiff.

Elwyn, for the appellant.

MORPHY, J. This action is brought to recover \$460 36, the amount of certain errors alleged to have been discovered in a settlement made with the defendant for the price of a number of crates of crockery, sold to him by the plaintiff. The answer pleads the general issue, and specially denies that there has been any error as alleged in the settlement referred to. It further denies that the invoice annexed to plaintiff's petition is the genuine invoice

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by which the goods were imported, and that the prices are carried out at "1814 prices" according to the agreement, &c. The answer avers that, in consequence of such overcharges and advances, the defendant has paid one thousand dollars more than the true value of the goods, which sum is pleaded in reconvention. The jury who tried the case, allowed the plaintiff \$350, for which judgment was entered up in his favor. The defendant has appealed.

This case presents no question of law. In relation to the errors alleged to have been committed in the settlement, and the prices of the articles sold, a great deal of evidence has been adduced on both sides. Much has been said about the prices of painted and printed ware, and the difference between the 1814 prices and the nett prices, and the per centage advance necessary to make the goods equal to the 1814 prices, &c. We do not pretend to understand these matters better than the jury did, and will not disturb their verdict, as upon an examination of all the evidence we find nothing in it to convince us that injustice has been done to the appellant.

Judgment affirmed.

MARGUERITE AURORE DROUET and others v. JOHN RICE and another.

Where property sold under execution at twelve months' credit, and conveyed to the purchaser, is resold on account of the failure of the latter to pay the price, the first purchaser, or his heirs alone, can avail themselves of any irregularities in the second sale. The original owner, having been divested of his title, by the first adjudication, cannot take advantage of any illegality in the second sale.

A scrawl, enclosing the letters L. S. affixed to a *fi. fa.*, will be good as a seal, where, from being used in other writs issued from the same court, it is to be presumed that the court had no engraved seal.

A sheriff's deed, under the act of 10th April, 1805, headed with the title of the suit under which the property was sold, and referring to the *fi. fa.* which recites the judgment and mentions the court by which it was rendered, contains a sufficient reference to the judgment under which the writ was issued.

After the lapse of twenty years, the legal presumption is in favor of the acts of sheriffs. Proceedings for the forced alienation of property under the former laws of this State,

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will not be scrutinized with the same rigor as those under the present system, the formalities required by which are well defined in the Code of Practice.

Under the act of 10th of March, 1834, all informalities connected with any public sale by a parish judge, sheriff, auctioneer, or other public officer, are prescribed by the lapse of five years.

APPEAL from the District Court of the First District, *Buchanan, J.*

J. F. Pepin and A. Hennen, for the appellants.

Preston, for the defendants.

MORPHY, J. This suit is brought to recover six lots and a half in the Second Municipality of New Orleans, occupying the whole front of a square on St. Peter street, with a depth of one hundred and twenty feet on Perdido and Poydras streets. The petitioners allege that Joseph Drouet, whose children and heirs they are, purchased this property of Jean Gravier, on the 14th of April, 1807, and remained in possession of it until his death, which happened on the 20th of October, 1811; that the defendants are in possession of the six lots and a half; that they claim them as their own property, and refuse to deliver them up, although amicably requested so to do. The defendants deny that the plaintiffs have any right or title to the lots described in their petition, but aver that they, the defendants, are the sole and rightful owners of the same. They plead prescription, and pray that John H. Holland, from whom they purchased, may be cited in warranty, &c. The District Court gave judgment in favor of the defendants, and the plaintiffs have appealed.

The facts of the case show that, on the 29th of November, 1814, George Moreau, a free man of color, obtained a judgment for \$434 against the heirs of Joseph Drouet, the present plaintiffs, or those under whom they claim; that under this judgment four lots and a half of those now claimed, were levied upon, and, on the 4th of September, 1815, sold to Samuel C. Young, for \$730, at one year's credit; that on his failure to pay the price, he was sued by G. Morgan, then sheriff, together with P. F. Gabourdet, his surety on the twelve months' bond, and that on the exposure of the same property for sale by the coroner, it was adjudicated, on the 8th of July, 1818, to Benjamin F. Porter, who, it afterwards appeared, had bought it for himself and for John H. Hol-

land ; that at the death of the former, his executors had his undivided half of these lots offered for sale, when it was purchased by Holland, who, in 1835, sold to the present defendants not only these four and a half lots, but, also the two adjoining ones extending to Poydras street, which he had shortly before purchased from the plaintiffs and their co-heirs.

There is no dispute as to the two lots last mentioned, all claim to them having been withdrawn ; but, in relation to the others, it has been contended that the adjudication to John H. Holland, at the coroner's sale, was null and void, because Holland was at that time acting in the capacity of a deputy coroner, and could not lawfully purchase at a sale made by himself in that capacity. It is clear that if there is illegality in this sale, none but the heirs of Young can avail themselves of it. As to these plaintiffs, they had nothing to do with it, as they had been previously divested of their title by the adjudication of their property to Samuel C. Young in 1815. But it is urged that the sheriff's sale, in the suit of *Moreau v. Drouet*, was irregular and void, and did not divest the plaintiffs of their title. The nullities and irregularities relied on are : *first*, that the writ of *fi. fa.*, under which the sale was made, had no seal affixed to it ; *secondly*, that the sheriff's deed of sale to Samuel C. Young does not refer to or mention the judgment under which the *fi. fa.* had been issued ; *thirdly*, that the property seized was described in the sheriff's return as a lot with buildings thereon, and sold as being four lots and a half.

I. This point was not much insisted upon. We consider it, at all events, as one of minor importance, as we had occasion to say in the case of *Fink v. Lallande*, 16 La. 554. The writ is in due form, and signed by the clerk. On examining the record of the case of *Moreau v. Drouet*, which has been sent up in the original, we find that no less than five writs of *fi. fa.* were successively issued. On all these, and on the other papers of the suit, we see the same kind of scrawl, to wit, a scrawl with the letters L. S. inscribed. We are bound to infer that in 1815 the Parish Court of New Orleans had no engraved seal, nor are we aware of any law that made it its duty to have one.

II. The sheriff's deed of sale is headed with the title of the suit of *Moreau v. The Heirs of Drouet*. It, moreover, refers to the writ

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of *fi. fa.*, which recites the judgment and the court by which it was rendered. This we held to be sufficient in *Brosnaham et al. v. Turner*, 16 La. 441, when a similar objection was urged. On examining the form prescribed by the legislature for a sheriff's deed at that time, we find that the sheriff copied his deed to Young almost *verbatim* from that form, which does not require the recital of the judgment. 2 Mart. Dig. 334.

III. The identity of the property seized with that sold, is sufficiently established by the testimony of Lemos, the deputy sheriff, and by the description given of it in the sheriff's deed. This court have more than once declared that, after the lapse of twenty years, the legal presumption must be in favor of the validity of the acts of sheriffs; and that proceedings had under the former laws of the State will not be scrutinized with the same degree of rigor as under our present system, in which the formalities required in forced alienations are well defined and pointed out by the Code of Practice. 16 La. 554. In the present case, the defendants have shown a judgment, an execution, a return thereon, and a sheriff's deed. This is as much as can be reasonably required, when it is considered that the suit of *Moreau v. Drouet* was instituted in May, 1813, and bears the No. 17 on the docket of the Parish Court. They, moreover, show that they, or those under whom they hold, have improved the property, and occupied it upwards of twenty years, and that as far back as the year 1826, it was put down on the assessment rolls as belonging to John H. Holland. Upon such a showing the defendants could have safely rested their case; but they have invoked the statute of the 10th of March, 1834, which was, no doubt, intended to put a stop to suits of the description of the one before us. It provides that all informalities connected with, or growing out of any public sale made by a parish judge, sheriff, auctioneer, or other public officer, shall, after the lapse of five years from the making of the same, be prescribed against, &c. This provision of law seems to us to cover completely the case of the defendants, against whom this suit was instituted only on the 19th of March, 1840.

Judgment affirmed.

ROBERT MURPHY v. JEAN JACQUES JANDOT.

Where a mortgage contains the clause *de non alienando*, no transfer of the property can affect the mortgagee's right to proceed against it, summarily, as if still belonging to the mortgagor.

A sale by a sheriff of an immoveable, seized under a *fi. fa.*, is void as to third persons not proved to have had actual notice, when it has not been recorded in the office of the Register of Conveyances as required by law.

APPEAL from the Parish Court of New Orleans. One Yates having obtained a judgment against Hannah Clark, caused a *fi. fa.* to be levied on a lot of ground in the *faubourg* Tremé, on the Bayou road, between Rampart and St. Claude streets, which, not bringing two-thirds of its appraised value, was sold, on the 30th April, 1840, to Robert Murphy, the plaintiff, for \$1125, at twelve months credit. A conveyance was executed to him, by the sheriff, on the 5th of May. The deed was recorded in the Mortgage Office on the 10th of August following, and by the Register of Conveyances on the 24th of the same month. In the month of June of the same year, Hannah Clark mortgaged the lot to Jandot, the defendant, to secure a sum of \$750. This mortgage was recorded in the office of the Recorder of Mortgages on the 25th of that month. Jandot having taken out an order of seizure and sale, Murphy enjoined the proceedings against the property, alleging himself to be the owner under the sheriff's deed, and praying to be declared such, and that the mortgage to the defendant might be decreed to be null and void. Jandot answered, that the sale to Murphy not having been recorded in the time prescribed by law, was void. The answer, after some other allegations, concluded with a prayer for damages. On the trial, the plaintiff attempted to show that Jandot knew of the purchase made by the former at the sheriff's sale, and that he was aware of the plaintiff's possession from that time. The evidence on this point will be found in the opinion delivered by Bullard, J. The injunction was dissolved with damages, by Maurian, J., and the plaintiff has appealed.

Budd, for the appellant, contended that at the time of the execution of the mortgage to Jandot, Hannah Clark had been divest-

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ed of all title to the property, by the seizure and sale under the *fi. fa.* in favor of Yates.

Buisson, for the plaintiff. The sale to Murphy not having been registered in the Conveyance Office, until after the execution of the mortgage to Jandot, cannot affect him. Act of 20th March, 1827, Sess. acts, pp. 136—8, § 1, 5. Code Pract. art. 696. 10 La. 522. 11 Ib. 490.

BULLARD, J. The defendant, Jandot, having sued out an order of seizure and sale against a lot of ground in possession of the plaintiff, the latter obtained an injunction to stay the proceedings, on the allegations that he was the owner of the lot by sheriff's sale, at the time the former owner, Hannah Clark, mortgaged it to Jandot; and that although the sheriff's deed had not been previously recorded in the office of the Register of Conveyances, yet Jandot knew of the sale to the plaintiff and of his possession. It was further alleged that no legal notices were given or demand made, before proceeding by order of seizure and sale. The injunction was dissolved with damages, and the plaintiff has appealed.

The mortgage to Jandot contains the clause *de non alienando*, and consequently no transfer of the property would affect his right to proceed summarily against it, as if still belonging to the mortgagor.

The deed to Murphy was not recorded in the office of the Register of Conveyances, until after the former owner had mortgaged it to the defendant. But it is said that Jandot knew of the plaintiff's title and possession. Upon this point the evidence shows, that Jandot called at the sheriff's office in December, 1840, and inquired if it was true that the property had been sold at public sheriff's sale. He said that he had lent money on the lot; that he had employed *Buisson* to examine the titles, and that *Buisson* had told him that the title was good, and that he might lend the money upon it. The witness adds that Jandot was aware that Murphy was in possession of the property since the adjudication. It is further shown that the sheriff's sale was advertised as usual in the newspapers, and that Jandot was in the habit of attending public sales, and of inquiring about property advertised, its appraise-

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ment, and its worth. It is further shown that Jandot appeared very sorry lest he might lose his money, and that he blamed his counsel.

This evidence did not appear to the judge sufficient to bring home to the plaintiff a knowledge of the sale, and we think he did not err. The knowledge of the possession by Murphy, does not necessarily imply that Jandot knew that Murphy had purchased at the sheriff's sale, the more especially as no public notice had been given, as required by law, by recording the conveyance.

Judgment affirmed.

MARITZ ROTHSCHILD and others v. GEORGE P. BOWERS.

An exception that the claim is a joint one against several persons, some of whom have not been made parties, is too late after the case has been remanded for a new trial. It should have been pleaded, before issue joined, on the first trial. C. P. 333.

The obligations of co-sureties to pay their portions to the surety who has paid the whole debt, and the proportion in which they are bound to pay, depend upon the law, and not upon the contract. They are bound, severally, to pay their respective proportions, and the surety who has paid the whole debt is subrogated to the rights and actions of the creditor, and entitled to recover the rate of interest which he paid.

APPEAL from the District Court of the First District, *Buchanan, J.*

Lockett, for the plaintiffs.

A. Hennen, for the appellant.

BULLARD, J. This case was before the Supreme Court some years since, and was then remanded for a new trial. See 9 La. 528.

The ancestor of the plaintiffs, who had signed a bond with several other persons as sureties for a Paymaster, paid the whole amount of the judgment recovered in the Federal Court against all the sureties *in solido*, and this action is against one of the co-sureties and co-defendants for his proportion.

Previously to the former appeal, the parties entered into a writ-

ten agreement that "the case should be tried before the Supreme Court upon the petition, answer, and bills of exception, &c., the controversy being narrowed to a single point, viz., whether the judgment rendered in the United States Court in the case of the *United States v. The Securities of Gibbs* be valid against this defendant." This court held that the record in that case was admissible in evidence, being of opinion that the present defendant was condemned as surety *in solido* with others, to pay the damages which had accrued to the United States in consequence of the misconduct of the Paymaster, their principal; and that as to him and others who were parties to the proceedings which took place in the Federal Court, the judgment then rendered was *res judicata*, and conclusive evidence against all and each of them. But the court, instead of giving judgment against the defendant for his share, remanded the cause for a new trial.

After the case was remanded, the defendant filed a new exception, to wit, that the claim is a joint one against several persons, who are not made parties defendant as required by law. No notice appears to have been taken of this exception, but the trial proceeded without any decision of the court upon it. This is called a peremptory exception; but is that its true character? The Code of Practice says, "it is a rule which governs in all cases of exceptions, except in such as relate to the absolute incompetency of the judge before whom the suit is brought, that they must be pleaded specially *a limine litis* before issue joined, otherwise they shall not be admitted." Art. 333. Now, in this case, there was not only an answer to the merits and an issue joined, but there had been a trial on that issue, and the case had been remanded for a second. The agreement, it appears to us, precludes such an exception, because it restricts the whole case to the single question, whether the judgment in the Federal Court was conclusive upon the defendant as to his liability. The court did not, therefore, err in disregarding the exception.

The defendant's counsel took a bill of exceptions to the rejection of a deposition, which was offered to prove that the defendant had no knowledge of the signature of the bond in the pleadings mentioned by Talcott and Bowers, that the partnership was dissolved when the process from the Federal Court was served

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on Talcott, and that the defendant was not in the State at the time of service. The court, in our opinion, did not err. It had already been decided that the record was conclusive against the defendant as a party to it.

The charge of the court to the jury was also excepted to. The jury were instructed: *First*, That the obligation of a debtor *in solido* to the co-debtor who has paid the solidary debt, under article 2100 of the Civil Code, is a *several* obligation.

Second, That the payment made by Rochelle of \$14,000 and upwards, is to be viewed as applicable for one-half to each of the judgments in the United States Court. *Third*, That the interest to be allowed, in case the jury find for the plaintiffs, is six per cent from the date of the payment by Rochelle, the plaintiffs being subrogated to the rights of the United States.

The court, in our opinion, did not err in this view of the law. The obligation of co-sureties to refund, and the proportion in which they are bound to refund, depend upon the law, and not upon the contract. They are bound, severally, to repay their proportion to the surety who has paid the whole debt, and the latter is subrogated to the rights and actions of the creditor, who has been satisfied. He is entitled to the same rate of interest which he paid. The jury does not appear to have erred on questions of fact.

Judgment affirmed.

SUCCESSION OF ALEXANDER MILNE—CHARLES GORDON, DUKE OF RICHMOND AND LENNOX, and another, Appellants.

A judgment ordering a certain sum belonging to a succession, in the hands of the executors, to be appropriated in a particular way, is not binding on a legatee not a party to the proceeding.

The bequest of a sum of money for a specified purpose, is a particular legacy. Such legacies are a charge upon the whole estate, and become the personal debt of the heir, and must be discharged in preference to all others, as if debts of the estate, though they exhaust the whole succession, or all that remains after the payment of the debts, and the contribution for the legitimate portions where there are forced heirs. C. C. 1627, 1661.

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Universal legatees are bound, personally, not only for the debts and charges of the succession, but to discharge all the legacies, unless in case of reduction (C. C. 1603); and where they wish to take the seisin of the succession from the testamentary executor, they must offer him a sum sufficient to pay the moveable legacies. C. C. 1664.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

SIMON, J. This case comes up on a rule taken by the appellants on the dative testamentary executor of the last will and testament of Alexander Milne, deceased, to show cause why he should not pay over to them the amount of money now in his hands belonging to the succession, or a sufficient sum to pay and satisfy the unliquidated balance of the judgment rendered by this court in March, 1841, in favor of the appellants, to wit, the sum of thirty-eight thousand dollars or thereabout. The several Orphan Asylums, the universal legatees of the deceased, were also notified to show cause, on the same day, in relation to the premises.

The defendants answered separately, to wit: the Milne Asylum for Destitute Orphan Girls, averred that they could make no objection to the rule taken against them by the appellants, reserving their rights upon the estate of their testator for the amount allowed them by the judgment of the Probate Court. The Female Orphan Society, and the Society for the Relief of Destitute Boys united in the foregoing answer. The Milne Asylum for Destitute Orphan Boys averred, that thirty thousand dollars having been allowed and appropriated by the inferior court to satisfy a particular legacy of the testator, to wit, for the building and establishing of two Asylums at Milneburgh, as stated in the will, the money now in bank, has been appropriated, by order of the court, to that use; and that the two Milne Asylums ought to have the preference over a foreign legatee. They also allege that they have at least equal rights, and that the appellants have already received nearly eighty thousand dollars on account of their legacy, or of the legatees they represent. Wherefore, they pray that the rule be dismissed, or, at least, so modified as not to interfere with the rights of the other legatees. On these pleadings the question was tried, and the judge *a quo* being of opinion that the Milne Asylums should be first provided with the establishments necessary for their location

at Milneburgh, and that the balance due to the plaintiffs must come from other assets than the sum appropriated for the establishment of the Milne Asylums, discharged the rule. From this judgment, the plaintiffs in the rule have appealed.

The evidence shows that on the 30th of September, 1840, a judgment was rendered by the Court of Probates, ordering the sum of \$30,000 to be specially appropriated by the testamentary executor for the purpose of providing the two Milne Orphan Asylums, with buildings, &c. &c., to be distributed among them in the manner which the Asylums may deem fit. The appellants, who, at that time, had not yet set up their claim against the estate as particular legatees of the deceased, were not made parties to the proceedings which are now opposed to them, and they contend that they are not bound by the judgment on which one of the defendants in the rule relies. All the papers relative to the estate of the deceased were introduced in evidence by appellants' counsel; and it was admitted that there was in bank, belonging to the estate, about \$24,000, and \$10,000, in good notes, in the hands of the dative testamentary executor.

It is perfectly clear that the judgment rendered by the Probate Court on the 30th of September, 1840, in the absence of the applicants, who were neither called nor represented, is not binding on them; and that the appropriation therein ordered cannot prejudice their rights. It is as to them, *res inter alios acta*.

This proceeding being an application for the satisfaction of the judgment rendered by this court contradictorily with all the present appellees, in March, 1841, (17 La. 321, 332,) it is first proper to remark that we then considered the object of the appellants' demand as being a *particular legacy*. We said that, as such, it ought to be discharged in preference to all others, and that being a charge upon the whole estate, such a legacy became a personal debt of the heir, which he must satisfy, as any other debt due by the succession. This opinion was based on article 1627 of the Civil Code, which says: "Particular legacies must be discharged *in preference to all others*, even though they exhaust the whole succession, or all that remains after the payment of the debts, and the contributions for the legitimate portion, in case there are forced heirs;" and on article 1661, which provides that "in default of funds

sufficient to discharge the debts and *legacies of sums of money*, the testamentary executor shall cause himself to be authorized by the court to sell the moveables and the slaves not employed on plantations, and if they are insufficient, the immoveables, to a sufficient amount *to satisfy those debts and legacies*;" and we came to the conclusion that, as a simple pecuniary bequest, the legacy under consideration must be acquitted by the executors, or by the heirs, in the same manner as if it were a debt of the estate.

A careful re-examination of the question in connection with the actual and adverse pretensions of the Milne Asylum for Destitute Orphan Boys, has brought us to the inquiry whether the legacy of a sum of money, made by the deceased to the town of Fochabers, and which was the subject of the judgment here sought to be satisfied out of the funds of the estate actually realized, should be discharged *in toto*, in preference to and before providing the necessary means for building, establishing, and furnishing the two Milne Orphan Asylums created by the will of the deceased?

The clauses of the testament relative thereto, are as follows :
" It is my positive will and intention, that an Asylum for destitute orphan boys, and another Asylum for the relief of destitute orphan girls, shall be established at Milneburg, in this parish, under the names of the Milne Asylum for Destitute Orphan Boys, and Milne Asylum for Destitute Orphan Girls, and that my executors shall cause the same to be duly incorporated, by the proper authorities of this State; and to the said two contemplated institutions, and to the present institution of The Society for the Relief of Destitute Orphan Boys in the city of La Fayette and parish of Jefferson, in this State, and to the Poydras Female Asylum, in this city, I give and bequeath, in equal shares or interests of one-fourth to each, all my lands on the bayou St. John, and on the lake Pontchartrain, including the unsold lands of Milneburg.

" I institute *for my universal heirs and legatees*, in equal shares or portions, the said four institutions, that is to say, the two intended institutions at Milneburg, and the two Asylums aforesaid, in this city, and in the city of La Fayette, to whom *I give and bequeath the residue* of all the property and estate, moveable and immoveable, I may possess at the time of my decease, to be equally divided and apportioned among them."

Whatever liberal construction we may feel disposed to put upon the expressions made use of by the testator, and however desirous we may be that his benevolent intentions should be strictly carried into effect, there is, it seems to us, nothing in the foregoing dispositions that evinces, in any way, that the real intention of the deceased was that the expenses necessary to establish the two Asylums by him created, should be paid first, and out of the funds and moveables of his estate *in preference to any of the particular and pecuniary legacies* previously mentioned in his will. It is true that the testator expresses his wish and will that those two Asylums should be established at Milneburg, that they should bear his name, and that they should be duly incorporated; but, in our opinion, it would be going too far to say, that those institutions should be first provided with the establishments necessary for their location, in a manner contrary to the free exercise of the legal rights of the particular legatees; nay, it would be equal in effect to maintaining, that those expenses ought to be paid in preference to the debts of the succession, a proposition too absurd, in itself, to be for a moment countenanced by us.

It may be true, though it is not expressed in the will, that the two Asylums must be first established and provided with lots of ground, buildings, &c., before being considered as in existence, and that the idea of the testator was that his testamentary executors should, for that purpose, appropriate a sufficient sum of money to be taken out of the mass of his estate. It may, also, be true, that the funds so appropriated would be used for the benefit of the two Milne Asylums, over and above the universal legacy contained in the will, that is to say, that they should not be made accountable for those funds in their final settlement and partition with their co-universal legatees; but this is a matter exclusively between the residuary legatees, and is no reason why those institutions should have the preference over all the other legatees, and why the rule established by article 1627 of the Civil Code should be relaxed in their favor. The estate is considerable; the amount in dispute will not exhaust the whole means of the succession; and if it were made the duty of the executors, as is contended by the appellees, to give effect to the intention of the testator, by providing immediate pecuniary means for the location

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of the two Milne Asylums, they ought to have done so out of the active mass of the estate, without prejudicing the rights of those who, under a positive and imperative provision of the law, are entitled to be paid in preference to all others. This, three of the parties have felt and acknowledged, by pleading that they could make no objection to the rule taken against them by the appellants ; and we fully concur with them in this opinion.

Furthermore, it cannot be contested that the two Milne Asylums, together with the two other institutions, are merely universal and residuary legatees. The deceased bequeathed to them the universality of his estate, and, as such, they are entitled to be put in possession of the whole succession, and are seized of right of the effects thereof, if, at the decease of the testator, there are no heirs to whom a proportion of his property is reserved by law. Civ. Code, art. 1602. If so, how can it be pretended that they are in any way to be preferred to the appellants, even for a special purpose, when the law imposes upon them the obligation, as universal legatees, and says they are bound personally, not only for the debts and charges of the succession, but also *to discharge all the legacies*, (Civ. Code, art. 1603,) and that if they wish, at any time, to take the seisin from the testamentary executor, they must offer him *a sum sufficient to pay the moveable legacies*. Civ. Code, art. 1664. There would be an inconsistency in the exercise of their legal rights, which cannot for a moment be contemplated ; and if this exception to the general rule had been the intention of the testator, he would have said so. But the terms of the testament do not permit us to give it such a construction ; and the particular legacies, being by law assimilated to the debts of the succession, we cannot hesitate to say, unless the exception clearly appears from the context of the will, that they must first be paid.

It is therefore ordered, that the judgment of the Probate Court be reversed ; that the rule taken by the appellants be made absolute ; and that the appellees pay the costs in both courts.

Eustis, for the appellants.

Fourchy and *Canon*, contra.

ERASME LE GOASTER v. EMILE BARTHE, Syndic of Camille
Suppo de Valletti.

Simulated or fraudulent sales cannot be inquired into, by commencing by seizure and treating them as nullities.

Plaintiff, claiming certain lots of ground, obtained an injunction to prevent the syndic from selling them as the property of the insolvent, and prayed for its perpetuation, and for a judgment upon his title. The syndic having answered, plaintiff filed a supplemental petition alleging that the sale, under which the insolvent set up title to the property, was simulated. On an exception that the supplemental petition tended to change the issue: *Held*, that the action was originally petitory, and the supplemental petition correctly admitted.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Preaux and *D. Seghers*, for the plaintiff.

J. F. Pepin, for the appellant.

BULLARD, J. The plaintiff asserts title to certain city lots, and on representing that the syndic of the creditors of De Valletti is about selling them as the property of the insolvent, prayed for and obtained an injunction to prevent the sale. He asked for a judgment upon the title, and that the injunction might be made perpetual.

The defendant answered by denying the allegations in the petition, and, further, by averring that the lots belonged to De Valletti previous to his failure, and were surrendered by him to his creditors, to whom they now belong; that even admitting that the plaintiff did, by virtue of an order of seizure and sale, in a suit against Rillieux, cause said lots to be sold and purchased them himself, yet that such sale was not binding on De Valletti, who was then owner, because he was not made a party to the suit, and because the previous formalities to be observed in cases where the property is in the hands of third persons, had never taken place.

The plaintiff, thereupon, amended his petition by averring that the pretended sale from Rillieux to De Valletti, was a mere simulation, intended to defraud the petitioner. He avers that De Valletti was a party to the suit in which the judgment was rendered, on the execution whereof the property was sold by the sheriff; that the sale was made without opposition from De Valletti, and

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that he did not make any opposition to the monition upon which the sale has since been homologated.

To this petition an answer was filed by the syndic, excepting to the supplemental petition as tending to change the issue, and pleading a general denial and that all the parties interested have not been brought in.

The facts as disclosed in the record are, that Le Goaster sold the lots to Rillieux, and that the notes given for the price were endorsed by Barthe, the present syndic. Suit was brought against the drawer and endorser, praying that the lots might be sold to pay the price. The drawer and endorser answered jointly. Judgment was rendered against them *in solido*. They appealed, and De Valletti became their security on the appeal bond. The judgment was affirmed, with damages, and afterwards the lots were seized and sold, and Le Goaster became the purchaser, who prosecuted a monition, and, there being no opposition, the sale was homologated.

On the other hand, it appears that Rillieux sold a part of the property to Perrault, and that it was subsequently acquired by Barthe, by exchange, in 1836. Barthe shortly afterwards sold to De Valletti, and about the same time De Valletti acquired the other part of the same property from Rillieux. The conveyances were recorded in the office of the Register of Conveyances, on the 23d October, 1839, a few days after the protest of Rillieux's notes to the plaintiff.

Thus it appears that the title was apparently in De Valletti, at the time the present plaintiff recovered his judgment against Rillieux and Barthe, and that De Valletti was surety on the appeal bond. When the seizure took place, De Valletti took no steps to protect his possession as a third possessor, but suffered the property to be sold as still belonging to Rillieux, the original purchaser. It is clear that the title of De Valletti would have been cut off by the sheriff's sale, if he had had notice of the proceeding, and an opportunity to elect whether he would pay off the mortgage of Le Goaster, or suffer the property to be sold.

De Valletti, the insolvent, in one of the acts of sale, not only acknowledges the existence of Le Goaster's mortgage, but assumes

to pay \$1400 of the amount still due, as a part of the price of his own acquisition.

The record further shows that De Valletti was the surety of Rillieux and Barthe on the appeal bond. After the sale of the lot under execution, a rule was taken upon him to show cause why he should not pay to the plaintiff the sum of \$431 40, being the amount due on the judgment rendered in the case, the property seized not having been sufficient to satisfy the amount of the judgment in capital, interest, and costs, as appeared by the return of the sheriff. This rule was served upon De Valletti, and informed him of the sale of the lots by the sheriff; but it does not appear that any thing further was done.

Nor did De Valletti make any opposition to the homologation of the sale. We are not, however, prepared to say that the proceedings on the monition cured the defect in the plaintiff's title, resulting from not having made De Valletti a party, as third possessor, in the hypothecary proceedings. It is mentioned as furnishing a presumption that the sale to De Valletti was a mere simulation. The question then arises, could such evidence be admitted in this case? And that depends upon the question, whether the amended petition, alleging the simulation of the sale to De Valletti, was properly admitted. We concur with the Parish Court in the opinion that it was. If that allegation had been inserted in the original petition, it would not have been liable to any objection, and would have brought the validity of De Valletti's pretended title directly in issue. Those decisions of the court which go to show that simulation and fraud cannot be enquired into, by commencing by a seizure and treating them as nullities, are not applicable to this case. This action was originally petitory, and the plaintiff may well have asserted the nullity of the pretended title under which the defendant holds. He has done so by the amendment, and all the parties having any interest in the question are before the court. 8 Mart. N. S. 438.

All the circumstances attending these transactions prove, to our satisfaction, that the sale to De Valletti was not real, but simulated, and that the plaintiff has made out his title.

Judgment affirmed.

SUCCESSION OF JOHN HENDERSON—WILLIAM CROSS and others,
Executors, Appellants.

To entitle one, not a party to the cause, to an appeal from the judgment, under art. 571 of the Code of Practice, he must have a pecuniary interest, and be aggrieved. Where the interest is not apparent on the record, the case will be remanded to ascertain it.

The act of 16 March, 1842, explanatory of art. 924 of the Code of Practice, was intended to have a future, not a retrospective operation.

Notice of an application for the appointment of dative testamentary executor must be given, in all cases, in the same manner as on an application for the appointment of an administrator. The publication of such notice has not been dispensed with by the act of 16th March, 1842.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*
GARLAND, J. In the month of February, 1842, the appellants, Cross and others, presented a petition to the Court of Probates, stating that they were the testamentary executors of John Henderson, who died in Scotland; that they had made due proof of his will, which had been regularly admitted to probate in that country, and that they had duly qualified as his executors. They stated that Stephen Henderson had for some time acted as administrator of the estate, and had at one time made opposition to their acting as executors here, but that upon the production of sufficient evidence, he had withdrawn his opposition. They, therefore, prayed that the will might be registered or recorded, and ordered to be executed; which was accordingly decreed. The executors then, through their authorized agents, proceeded to administer the estate, when, on the 7th of April, 1842, Henry R. Grandmont, stating himself to be the attorney of the absent heirs of said John Henderson, presented a petition to the Court of Probates, stating that Henderson had died in Scotland, leaving in this State a large amount of money, notes, and other property in the possession of Mylne & Thompson of New Orleans; that one of the sons of Henderson, to wit, Stephen Henderson, Jr., who resided in the town of Baton Rouge, had formerly been appointed administrator of the succession, and had caused an inventory to be made according to law; that since the appointment of said administrator, it had been ascertained that a will had been made, a copy of which was

then on record in the Probate Court, and that the execution of the same had been ordered on the 17th of February, 1842. He further stated that the executors or trustees appointed by the testator are absent, and cannot, therefore, under an act of the legislature, passed on the 16th of March, 1842, perform the duties of the trust. That said act provides that whenever the testamentary executor or executors named by the testator will not or cannot perform the duties, or may be dead or absent, the judge shall appoint one or more dative testamentary executors, as is provided by the 924th article, No. 7, of the Code of Practice, and in the same manner as if the testator had omitted to name his executor. The petitioner then proceeds to aver, that it is necessary that some person should be appointed to execute the will, which contains universal dispositions in favor of the absent heirs, and to settle the estate finally. He avers that Mylne & Thompson cannot be appointed, as they are agents of the deceased, and accountable as such; and that Stephen Henderson, Jr., the former administrator, cannot be appointed, as he also has an account to render; wherefore, he prays that a fit and disinterested person may be appointed dative testamentary executor in conformity to law. Whereupon the Judge of the Court of Probates, on the same day, without notice to any one, or proof of the facts stated, so far as the record shows, ordered that "Joseph Bosque, Esq., be appointed dative testamentary-executor of the estate, on his complying with the requisites of the law."

On the 22d of April, 1842, Cross, and his co-executors presented a petition to the Court of Probates, recapitulating briefly the previous proceedings and the judgment of the court appointing Bosque as dative executor, alleging that they are interested, and that their rights and interests will be seriously affected by the judgment appointing Bosque to administer the estate of their testator, and praying an appeal, which was allowed.

In this court it is admitted, that the will of Henderson had been presented to the Probate Court, and ordered to be registered and executed. That the executors were represented by attorneys in fact, properly appointed, and their powers on file in the said court. That the nomination of Bosque was on the *ex parte* application of the attorney of the absent heirs, without advertisement, or notice

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to the executors, or to their agents. In addition to which admission; it appears from the petition that John Henderson had a son in this State at the time.

The counsel for Bosque, and the attorney for the absent heirs, have moved to dismiss the appeal, on the ground that the appellants have no right to it, not being interested.

Article 571 of the Code of Practice gives the right of appeal, not only to the parties to the cause in which judgment has been rendered, but to all third persons not parties, who shall allege that they have been aggrieved by the judgment. Under this article many appeals have been taken by persons not parties to the suit, and, in acting under it, we have held that the appellant must have a pecuniary interest and be aggrieved. 4 Mart. N. S. 623. 7 Ib. N. S. 575. When the interest is not apparent on the record, we have repeatedly sent the case to the inferior court to ascertain it. In this case, the interest in our opinion is apparent, and we could scarcely think the counsel serious, when he contended that individuals, who were deprived of the administration of a large estate, had no such interest in the judgment that deprived them of it as would authorize them to appeal. The case of the *Succession of F. De Armas*, 1 Robinson, 461, recently decided, does not sustain the counsel in his position. In that case, Le Carpentier had been appointed dative executor without opposition; afterwards Doriocourt, who had no interest, either as an heir or creditor, came in and asked to be appointed executor with Le Carpentier, averring that he intended to have made an application for the appointment, but did not until the other was appointed. He also made objections to the appointment of Le Carpentier. We said that he had no interest, as he had no legal right or claim to be appointed, being in no way related to, or privy to the affairs of De Armas. Had the Judge of the Court of Probates, in the exercise of his discretion, thought proper to appoint Doriocourt dative executor, without notice, and to have deprived Le Carpentier of his office, then a case, something like the present, would have existed; and there could not have been a doubt of the right of the latter to an appeal.

As to the argument that no issue was joined between the parties, we must say that it comes with a very bad grace, when the record shows that no opportunity was afforded to any one to make

an objection or to raise an issue. The presentation of the petition was instantly succeeded by the judgment. But, under the article of the Code of Practice before quoted, it is not necessary that a third person should have joined issue with either the plaintiff or defendant. If the interest and injury are made to appear, the right of appeal exists.

This case presents an anomaly in judicial proceedings. An individual in no way connected with the deceased, either as heir, creditor, relative, or friend, is, without any public solicitation on his part, or notice to any one interested, except the attorney of the absent heirs, appointed sole executor to manage a large estate, which the judge of the court knew was then being administered by the agents of the executors duly appointed by the testator, and who had been, not more than six weeks previously, recognized by the judge himself, and put in possession of the estate, a son of the deceased being also in the State, and making no objection. And this is said to have been done by virtue of a law passed after the executors and their agents were recognized by the proper tribunal. We suppose the judge of the Court of Probates fully understands the act of the legislature, approved March 16th, 1842, entitled "An act explanatory of the 924th article of the Code of Practice," &c. Acts of 1842, p. 42. If so, he doubtless knows that it is applicable to future cases. A perusal of the act satisfies us that the legislature so intended; and that no idea existed in that department of the government, that it was making a law to affect vested rights, and change the interests which parties had acquired in judgments already given. The legislature knew that laws proscribe for the future, and can have no retrospective operation; nor can they impair the obligation of contracts. So says the constitution of the State; so says the Civil Code, article 8; and so have this court said, in a case in which the judge of the Court of Probates was a party. 12 La. 352.

But if we admit that the act of the legislature relied on is applicable to the succession of John Henderson, there is another fatal objection to the appointment of Joseph Bosque, as dative testamentary executor. No notice was ever published of his application to be so appointed. In the case of *Girod's Heirs v. His Executors*, this court, after mature deliberation, held, that a notice of an

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application for the appointment of dative testamentary executor must be given in all cases, in the same manner as for the appointment of administrators of estates. 18 La. 402. The publication of this notice has not been dispensed with by the act of 1842, whatever the enlightened framers of it may have intended. The clause of the 924th article of the Code of Practice, which it was the object of that act to explain, calls the persons appointed under the will administrators, thus showing that they were regarded in the same light as other administrators; and as they have to act and account in the same mode, there is no reason why there should be any difference in the manner of appointing them.

The judgment of the Probate Court appointing Joseph Bosque dative testamentary executor of the estate of John Henderson, deceased, is annulled, and the appointment vacated and set aside; the appellees paying the costs of both courts.

Grymes, for the appellants.

Soulé, contra.

THE STATE v. THE JUDGE OF THE FIRST JUDICIAL DISTRICT.

No appeal, suspensive or devolutive, will lie from a judgment, rendered in the progress of a suit by a wife against her husband to recover the administration and possession of her paraphernal property which had been sequestered on the execution of a bond with security, ordering her to be put in possession of the sequestered property, or from one overruling a motion to set aside the sequestration. They are interlocutory judgments, from which no appeal will lie unless they work irreparable injury. The bond protects the husband from injury.

APPLICATION for a mandamus to the Judge of the First Judicial District.

George A. Waggaman presented a petition representing that an action had been instituted against him in the District Court of the First Judicial District, by his wife, to withdraw from him the administration of her paraphernal property. That, at her instance, an order of sequestration had been issued, and executed on a plantation, and certain slaves, in the parish of Jefferson. That

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she subsequently obtained, *ex parte*, an order to put herself in possession of the property, on executing a bond, with surety, in the sum of ten thousand dollars. That this order was executed. That, not satisfied therewith, she asserted a right to expel the petitioner from the matrimonial domicile, in which both had resided for several years preceding. That this dwelling, which is on the sequestered estate, was built during the marriage, and belonged to the community of *acquêts*. That on the 24th of May she applied, *ex parte*, to the judge of the District Court, and obtained from him an order commanding the sheriff of the parish of Jefferson to expel the petitioner from the matrimonial domicile, and to put her in exclusive possession thereof, which order is now in the hands of the sheriff. That the judge has refused to grant a suspensive appeal from that order. Finally, that his right to reside in the matrimonial domicile is worth to him more than \$300, and that the injury resulting from the execution of the order will be irreparable. In consideration whereof he prayed that the judge *a quo* might be ordered to show cause why a peremptory mandamus should not be issued, commanding him to allow the appeal.

Buchanan, J., showed cause. That the plaintiff, having sued for the administration of her paraphernal property, and procured an order for its sequestration, on the 27th April, 1842, when more than ten days had elapsed since the execution of the sequestration without any application on the part of the defendant to bond the property, applied for leave to bond it herself, under the provisions of the act of 5th March, 1842, which she did.* That the

* Art. 279 of the Code of Practice provides, that "A defendant against whom a mandate of sequestration has been obtained, except in cases of failure, may have the same set aside by executing his obligation in favor of the sheriff, with one good and solvent surety, for whatever amount the judge may determine as being equal to the value of the property to be left in his possession."

The act of 5 March, 1842, p. 204, declares "That in actions of sequestration, whenever the defendant shall fail, or neglect to comply with the provisions of the 279th article of the Code of Practice within ten days after the seizure of the property by the sheriff, it shall then be lawful for the plaintiff, his agent, or attorney in fact, to give similar bond and security to the sheriff, as those required by law from the defendant, and to take the property sequestrated into his possession."

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effect of this bond was, to entitle the party to the possession of the property. That the defendant moved to set aside the sequestration, and, on the 19th of May, prayed for a suspensive appeal from the order of court putting the plaintiff in possession of the sequestered property, and from the interlocutory judgment overruling his motion to set aside the sequestration. That a devolutive appeal was allowed, and that, on the 21st of May, the defendant, by executing a bond in a sum sufficient to cover the costs, acquiesced therein. That the order of the 24th of May, expelling the defendant from the sequestered premises, was but a supplement and incident to that allowing the plaintiff to bond the property, from which last a devolutive appeal has been granted and accepted.

Canon and Roselius, for the appellant.

R. N. Ogden, contra.

MARTIN, J. To a rule to show cause why a mandamus should not be issued commanding the judge to grant a suspensive appeal to Geo. A. Waggaman, from a judgment obtained by Marie Camille Arnoult, his wife, against him, the judge has answered: that the wife having instituted a suit for a separation from bed and board, afterwards filed her petition claiming the administration of her paraphernal property, and praying for its sequestration. The property having been sequestered, and the husband having neglected to apply to bond the property within the period fixed by the Code of Practice, art. 279, the wife claimed the right of bonding under the act of the legislature, approved 5th of March, 1842; and an order was made accordingly. The husband moved to set aside the sequestration, on the ground that the property prayed to be sequestered was not paraphernal, but common, and that the sequestration had, on other grounds, been issued contrary to law. The motion was overruled, after argument. The husband then claimed a suspensive appeal from the interlocutory judgments, putting the wife in possession of the sequestered property, and overruling his motion to set aside the sequestration. The suspensive appeal was denied, and a devolutive one allowed, in compliance with which the husband executed his bond for the sum of two hundred dollars, to cover the costs of the appeal. The two judgments on which a mandamus for a suspensive ap-

peal is prayed, are mere interlocutory ones. No appeal, either devolutive or suspensive, can be had thereon, unless the party who seeks to appeal shows that they subject him to an irreparable injury. Code of Prac. art. 566. As to the first judgment, the bond, on the filing of which the order of sequestration was issued, amply protects the husband from any injury which may result to him from his wife's obtaining the possession of the sequestered property. The same bond will also protect him, if the District Court has erred in overruling his motion to set aside the sequestration.

*Rule discharged.**

ELSY ANN DURAND v. IRA H. DURAND.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case was submitted, without argument, by *Grymes*, for the appellant, and *Barton*, for the defendant.

BULLARD, J. The plaintiff represents that in 1834, through the agency of her husband, she caused to be adjudicated to her a square of ground in the suburb Boulogny. That when the authentic act of sale was to be made, she, in perfect confidence in

* *Roselius*, for a re-hearing. No application was made for a mandamus to obtain a suspensive appeal from either of the interlocutory judgments referred to in the opinion of the court. The wife was put in possession of the property, without any opposition on the part of the husband. But among the property sequestered is the dwelling in which the parties had their matrimonial domicile, and the question is, can a wife who sues for the administration of her paraphernal property, expel the husband from the common dwelling, pending the suit? The District Judge was of opinion that she could, and on the 24th of May granted, *ex parte*, an order directing the sheriff to remove the husband, by force, therefrom; and having refused to allow a suspensive appeal from this order, the defendant applied for a mandamus to compel him to grant it. It was on this application that the rule was allowed, and the sheriff provisionally enjoined from executing the order of the 24th of May. That order is calculated to injure the defendant irreparably. An action on the sequestration bond is no compensation to a father and husband, for a forcible and ignominious ejection from the matrimonial domicile.

Re-hearing refused.

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the honor and good faith of Ira H. Durand, caused the act to be passed to him in confidence and trust that he would hold the same for her use and benefit, and upon his special promise so to do. That she has actually paid the whole purchase money, which has become due. That she has since sold the lot of ground to Harper & Merrick, and that I. H. Durand, at her request, has signed the act of sale, the price of said sale being \$4175 18, of which \$500 was cash; but that since the passing of said sale the defendant pretends fraudulently to claim as his own, the money and notes given for the price, which are deposited with W. Y. Lewis, the notary. She, therefore, prays for a judgment decreeing that the money and notes belong to her, and may be given up to her, and that the defendant be enjoined from demanding or taking the same out of the hands of the notary.

An injunction was issued accordingly. The defendant, after setting up an exception which we do not consider it material to notice, answered by denying the plaintiff's title, and averring that he became the owner of the property, and had sold the same. He denied that any part of the price had been paid by the plaintiff; but says that, if any thing has been paid by J. M. Durand, her husband, it was out of his (defendant's) share in the estate of his father, which funds had been wrongfully withheld from him.

There was judgment in favor of the defendant, and the plaintiff has appealed.

The most material allegation in the plaintiff's petition, and without proving which she cannot succeed in this case, is, that the defendant acted as her agent in acquiring the square of land, and in executing a conveyance afterwards to Harper & Merrick. Of this fact, no evidence whatever has been given. Even admitting that the parol evidence was admissible, it would only tend to show that the husband John M. Durand, and not the wife, was the real contracting party. There is evidently something in the case which neither party is disposed fully to disclose, lest it should appear to be one of these in which courts of justice are forbidden to interfere.

Judgment affirmed.

DANIEL YARD and another v. THEIR CREDITORS.

Where money belonging to the estate of an insolvent, has been withdrawn from bank on the joint checks of the two syndics, and there is no proof of the amounts which they respectively received or retained, each will be presumed to have received one half.

The responsibility of the syndics of the creditors of an insolvent, is joint, not joint and several. C. C. 2983.

The penalty imposed by the act of 13th March, 1837, section 3, on syndics, curators, executors and administrators, for failing to comply with its provisions in regard to the depositing in bank of money belonging to the estates administered, is for the benefit of the estate, and not of any individual creditor.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. On a rule taken by the widow of Blois, one of the insolvents, against the syndics in this case, to show cause why they should not pay to her the sum of \$4222 25, as a privileged creditor by judgment, J. H. Field, one of the syndics, (Yard the other syndic having died in 1838,) was decreed to pay the whole amount of the claim, with damages on the same, at the rate of twenty per cent per annum, from the 37th of May, 1839, the date of the institution of the suit in the District Court to recover this amount, until paid. From this decree, Field has appealed.

The evidence shows that when the syndics filed their tableau of distribution in January, 1836,* a sum of \$10,000 was therein set apart and retained by them to meet this claim, and that of a minor son of Blois; that the money was deposited in the Orleans Bank, from which it appears to have been withdrawn on the joint checks of Yard and Field, in the early part of 1836, without any order of court. It is urged by the appellee that as the money could not have been drawn out of the Bank without the signature of Field on the checks, he must be held responsible for the whole amount of her claim on the estate. We think differently. There being no proof of what the syndics respectively received or retained, each must be presumed to have received one-half of the

* The tableau was fully homologated, and the funds of the estate ordered to be distributed in conformity thereto, on the 9th January, 1836.

money thus withdrawn on their joint check. Under the decisions of this court, their responsibility is joint, not joint and several. 11 Mart. 532. 3 La. 535 and 596. Civ. Code, art. 2983. As to the damages of twenty per cent allowed on the debt, we do not consider them warranted by law. In the first place, the statute of 1837, under which they have been decreed, was passed long subsequently to the appointment of the syndics and the withdrawal of the funds from the bank. But even if this law could be made to apply to the present case, its words are such that the damages would seem to be given for the use of the estate administered upon, and not for that of any individual creditor; and the prohibition to withdraw funds deposited in bank seems to exist and continue only until a tableau of distribution shall have been homologated. When this has been done, as in the present case, the syndic or syndics can and must withdraw the money to pay the debts of the estate. If they fail so to apply it, they are personally liable to the pursuit of the creditors. B. & C. Dig. p. 498. sec. 3.

The evidence shows that Field paid to the widow of Blois \$500 on account of her claim, a few days before the trial of this rule.

It is therefore ordered that the judgment of the District Court be reversed; and it is further ordered that J. H. Field be, and he is hereby decreed to pay to the widow of Blois the sum of sixteen hundred and eleven dollars and twelve cents, with legal interest from the 27th of May, 1839, until paid, with costs below, those of this appeal to be borne by the appellee.

Micou, for the appellant. No counsel appeared for the appellee.

THEOPHILE LEMAITRE V. JACQUES MERLE.

The master and owners of a vessel are not responsible for damage to the cargo occasioned by the perils of the sea, where no proof is adduced of want of care in stowing.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case was submitted without argument, by *Bodin*, for the plaintiff. No counsel appeared for the appellant.

MORPHY, J. The plaintiff claims \$391 85 for freight and pri-mage on goods shipped on board of the barque Anne Louise, transported from Bordeaux to this port, and delivered to the defendant, the consignee, in conformity with the bill of lading. The defendant admits the facts as set forth in the petition, but sets up a reconventional demand of \$170, which he prays may be deducted from the plaintiff's claim, averring that he made the latter a real tender of the balance actually due, to wit, \$221 85, which he refused to receive. The answer alleges that it was stipulated in Bordeaux with the shipper of the goods, which consisted of casks of claret, vinegar, white wine, &c., that they should be stowed on top of the goods placed at the bottom of the hold of the vessel. That, notwithstanding, this agreement, almost all the goods were placed at the bottom of the hold, and with so little care and attention that a large quantity of the hoops of the casks were rotten, and the plastering of the said casks destroyed by the action of the sea. That some of the barrels and casks were empty, and that the defendant was at great trouble and expense to repair the casks, &c. The plaintiff having recovered the full amount of his claim, Merle has appealed.

We can find nothing in the record to authorize the reversal of the judgment, asked for at our hands. The agreement set forth in the answer in relation to the stowage of the goods in a particular place, is positively disproved by the plaintiff's answers to the interrogatories put to him for the purpose of establishing it. The goods have been damaged ; but it is not shown to have been the result of any want of care or attention on the part of the captain in stowing them. The vessel suffered much by stress of weather ;

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and the damage complained of appears to have been caused by the perils of the sea, for which, under their contract, the master and owners cannot be held responsible.

Judgment affirmed.

EBENEZER MCINTOSH v. LOUIS H. GASTENHOFER and another.

As a general rule, where goods are acknowledged to have been received in good order, and are delivered in bad, the carrier will be responsible ; but he may show that the damage arose from causes which existed before the bailment, or from the defects of the thing itself.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Elmore*, for the plaintiff.

G. Strawbridge, for the appellants.

MARTIN, J. The defendants resisted a claim of the plaintiff for the freight of a number of crates of earthenware, on the ground that they had been shipped in good order and well conditioned, but had been delivered in such a state that the injury they had sustained on board of the ship was of greater amount than the freight claimed. Judgment was given for the plaintiff, and the defendants have appealed. The first judge received from the testimony the impression that the only injury which the crates could have received on board, must have resulted from bad stowage, or from water destroying the straw and exterior packing. The stowage appears to have been good, and no damage appears to have resulted from salt water on the voyage, the other merchandize having been delivered free of injury, which, from its consisting of sheet iron and tin, could not have remained uninjured had salt water reached either. Nor would the ship-owners be responsible had salt water reached the cargo in consequence of any storm, &c. The judge concluded that the only real cause of damage, must have been the condition of the merchandize when shipped ; that it was proved that these crates had been exposed to rain at Liverpool before their shipment ; that they were old when shipped ; that they had been brought down the river Mersey on flat-boats ; that this river is wide and filled with salt water, as the tide ebbs

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and flows to a very great height ; that they may have got wet with salt water in their transportation to Liverpool ; and that these facts will account for the rotten condition of the straw from salt water. A dealer in crockery, who purchased a part of the shipment, expressed his opinion that the crates had been wet before they were shipped.

It does not appear to us that the judge erred. The general rule is certainly that, when goods are acknowledged to be received in good order and delivered in bad, the carrier is responsible ; but it is open to the exception, that he may show that the damage arose from causes which existed anterior to the bailment, or from defect in the thing itself.

Judgment affirmed.

RADELLE HUNT and another v. THE ORLEANS COTTON PRESS
COMPANY.

Where no special contract has been made, the compensation of advocates and attorneys must be regulated, in a great degree, by the nature of their services. The difficulties of the case, the amount in controversy, and other attending circumstances, must be considered, in connection with the physical and mental labor, and the responsibility incurred.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. The plaintiffs were the counsel for the defendants in the suit of The Second Municipality of New Orleans against them, which was decided in this court about one year since, and having, as they allege, conducted it to a favorable issue, are compelled to ask the aid of the courts to obtain the compensation to which they consider themselves entitled. This course, they allege, was not adopted, until all efforts to compromise, or to refer the controversy to impartial arbitrators, had been rejected by the defendants.

When the plaintiffs undertook the defence of the above mentioned case, the defendants agreed to give them a retaining fee of \$3000, and in the event of success they were to give "a generous

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compensation, commensurate with the importance of the matters in controversy."

The property in controversy is proved to have been worth about \$500,000, and a witness swears that he would have charged as a fee, from two and a half to five per cent on the amount. That he thinks \$10,000 to each plaintiff, not unreasonable as a contingent fee. Other witnesses seem to think that too much, and none of them fix any sum, except by reference to the fees that were promised to other counsel who were associated with the plaintiffs. It appears that, after the plaintiffs were retained under the agreement before stated, a meeting of a number of persons who owned property in the neighborhood, whose titles were supposed to depend on the same questions, was held, and that among those present was the President of the Cotton Press Company. At this meeting it was agreed that these proprietors should pay a part of the expense of defending the suit, and that additional counsel should be employed. This was all done without consultation with the plaintiffs; and it was agreed to pay these associate counsel \$2000 each, as a retaining fee, and a liberal compensation in the event of success, which compensation was afterwards fixed at \$5000 for each of the counsel, by a committee representing these proprietors. That body fixed the fee of the plaintiff Hunt, at \$5000, and that of Lockett at \$2000; and offered to give bonds for the amount, payable in 1846, with interest at six per cent per annum, which was refused.

It was admitted on the trial, that the plaintiff Hunt had discharged his duty in a faithful and able manner. It was proved that Lockett took a part in the trial of the case in the inferior court, and was instrumental in procuring testimony, but that he did not argue it in this court on the appeal. The testimony is not very ample as to the extent of his services; but there is no charge that he neglected his duty or abandoned the case. It is further shown that, soon after Hunt and Lockett were retained, the latter recommended the defendants to employ Eustis, as associate counsel. The proposition was submitted to the committee of proprietors, and they declined doing so; but after the Parish Court had decided the case against them, one of this committee suggested the employment of Eustis, and it was agreed to.

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The District Court thought each plaintiff entitled to a fee of \$7,500, and, after deducting a payment of \$500 made to Hunt, gave him a judgment for \$7000; and because Lockett had recommended the employment of Eustis, deducted \$2,600 from the amount coming to him, and gave a judgment for \$4,900, and interest; from which judgment the defendants have appealed.

In this court the plaintiffs claim to have the judgment amended, and \$10,000 allowed to each, as originally demanded; and Lockett particularly desires, that he may be relieved from the payment of more than one half of the fee paid to Eustis.

It is well settled that, where no special contract exists as to the amount of compensation which advocates and attorneys are to receive, their fees are to be, in a great degree, regulated by the services they render. The difficulties of the case, the amount in controversy, and other attending circumstances, are to be considered, in connection with the physical and mental labor it was necessary to undergo, and the responsibilities under which the counsel acted. On the other hand, it should be remembered that the profession of the law is not one that is pursued for lucre only. Its professors should, and generally do remember, that they form a class of the community who are in some degree compensated for their labor, and the time spent in anxious search after knowledge, by the respect and regard entertained for them generally, and by the opportunities, so often afforded, of impressing on the age in which they live, the spirit and genius which animate them. To an elevated mind this is a high reward.

With the plaintiffs, distinguished as they are in the profession, were at first associated three other gentlemen standing in its front ranks, with a retaining fee of \$2000 each; and, subsequently, another, in no wise their inferior, was added. After the decision of the case, each of those gentlemen consented to receive \$5000, as their contingent fee. It is very true that the plaintiffs were not consulted as to the employment of these associates; but they knew that they were engaged, and acted with them. We think all the counsel should, as to compensation, be put on the same footing; and as three of those last employed received retaining fees of \$2000 each, we shall consider that in forming our judgment.

As to compelling Lockett to pay \$2,600 of the fee of Eus-

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tis, we can see no reason in law or equity for it. When the former suggested the employment of the latter, the committee, representing the defendants, declined acceding to it. More than a year after, when the defendants had lost their case in part, Eustis was employed on the suggestion of one of the committee. As to the services rendered, the defendants never complained until called on for payment. There is nothing in the evidence to induce us to make any distinction between Lockett, and those with whom he acted.

The plaintiff Hunt, having received \$500 on account, we will apply it in such a manner to his demand, as to make him equal to the other counsel who were associated with him.

The judgment of the District Court as to the plaintiff Randell Hunt, is therefore annulled, and it is ordered that he recover of the defendants, the New Orleans Cotton Press Company, the sum of five thousand dollars, with legal interest from the 4th of December, 1841, until paid; and as to the plaintiff Henry Lockett, we order and decree that the judgment of the inferior court be amended in his favor, and that he recover of the aforesaid defendants the sum of five thousand five hundred dollars, with legal interest from the date last aforesaid, until paid. The costs in the District Court to be paid by defendants; those of the appeal to be paid in equal portions by them, and the said Randell Hunt.

Roselius, for the plaintiffs. *Hoffman*, for the appellants.

ELIZABETH JANE BARNARD and another v. JAMES ERWIN and another.

The object of the special mortgage authorized to be executed by the act of the 11th March, 1830, relative to the tutors and curators of minors, is to secure the rights and property of the minor, and the faithful administration of the tutor until his final discharge. It is a substitute for the general legal mortgage, so far as the rights of the minor are concerned; and is special only as to the property subject to it. As soon as the special mortgage is accepted and recorded, the general mortgage resulting from the tutorship ceases to exist as to third persons, and the mass of the property will be released, though an error may have been committed in ascertaining the amount due to the minor at the time of executing the special mortgage. The

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latter is not restricted to the amount supposed to be due at the time it was given. The property specially mortgaged will be bound for whatever may be due from the tutor on the final settlement of his accounts. The amount found due to the minor by the Court of Probates during his minority, will not be conclusive upon him. The account may be opened on the final settlement of the tutorship.

Where in order to pay the amount due to one who has attained his majority, it is necessary to sell property, specially mortgaged by a tutor under the act of 1830, to secure the rights of the minors, the property will be sold, to make the amount due to the former, subject to the mortgage in favor of the other minors. To sell the whole property for cash, and to pay over the amount due to those yet minors to their tutor, would be to defeat the very purpose of the mortgage.

In an action against a third possessor of property, specially mortgaged by a tutor under the act of 1830 to secure the rights of the minor and the faithful discharge of his duties as tutor, where the rights of the minor had been settled by a judgment of the Court of Probates, the plaintiff, the former minor, will be entitled to legal interest, on the amount so fixed, from the date of the judgment settling his claim.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The petitioners, who are the children of William Brand, one of them emancipated by marriage, and the other two minors represented by their under-tutor, allege that they are the sole heirs of their deceased mother, the wife of William Brand. That, on the decease of their mother, their father became their tutor, and was duly qualified as such. That he instituted proceedings in the Probate Court for the purpose of liquidating and determining the rights of the petitioners in the succession of their mother, which proceedings resulted in a judgment, whereby the rights of the petitioners were liquidated and settled at \$15,894 08, which liquidation was made with the view of giving a special mortgage in favor of his minor children, in lieu of the general one resulting from his tutorship. That, finally, on the 21st of June, 1837, by notarial act, he declared that he gave the special mortgage on a particular piece of property, in order to secure the sum of \$41,600 89, and his faithful administration and performance of his duties as tutor of his minor children.

They represent that this special mortgage was accepted by the Court of Probates, in lieu of the general mortgage which had existed in their favor, which general mortgage was ordered to be cancelled, and the special one to stand alone as security for the tutor's faithful administration of the property of his children.

They further represent that afterwards, in 1841, they discover-

ed that there was an error of calculation in the report of the auditor, which formed the basis of the decree of the Court of Probates, establishing the rights of the petitioners in the succession of their mother as above stated, and that their claim in truth exceeded the amount thus fixed by \$12,396 62, whereupon they instituted proceedings in the Court of Probates for the purpose of correcting said error, which resulted in a judgment, signed on the 8th of December, 1841, whereby the former judgment was amended, and the rights of the petitioners finally settled at the above amount over and above the sum previously fixed, making in all \$28,290 70 due to them in right of their mother; one-third of which sum, to wit, \$9430 23, was decreed to be paid to the plaintiff, Elizabeth J. Barnard, aided by her husband, and the whole to remain secured by mortgage on the property specially mortgaged.

The plaintiffs further aver that the premises thus mortgaged are now in the possession of James Erwin, by whom they were acquired, subject to said mortgage; that due demand has been made of William Brand, the principal debtor, and of Erwin, the third possessor, who refuse to pay the sum due to E. J. Barnard, one of the petitioners; and that said Erwin denies that the premises are liable in his possession to the mortgage, although duly recorded long before he acquired the property.

They, therefore, pray that Erwin may be cited, as well as Brand, and that it may be decreed that the mortgaged premises are bound for the payment of the sum of \$28,290 70, with legal interest from June 16, 1837, the date of the judgment fixing the amount of the plaintiffs' claims, until paid; and that the property may be sold for the payment of the same, one-third of the price to be paid in cash to E. J. Barnard, and the other two-thirds to remain in the hands of the purchaser, secured by mortgage on the property, with interest, payable in equal portions to the other two petitioners, Frederick Browder Brand and Ann A. Brand, as they shall attain the age of majority or be emancipated.

The third possessor answers, that he is in possession of the house and lot mentioned in the petition, by an unincumbered title, by virtue of a sale under the authority of a court of competent jurisdiction, except that it is subject to a mortgage amounting to \$15,894 43, which was fixed and ascertained by a judgment of the

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Court of Probates. He avers that, trusting to the truth and correctness of the liquidation and judgment of the court establishing the rights of the minors, he took a mortgage on the house and lot, in total ignorance of the rights of the minors, further than is shown by the proceedings in the Court of Probates as they existed at the time of his mortgage. He further alleges that William Brand was possessed of a large property in real estate, which was unincumbered at the time that he gave his mortgage to this defendant, and which he has since alienated, and that the plaintiffs are bound to go on the property which remained unincumbered, and to look to the property last alienated. He, therefore, pleads the judgment of the 16th June, 1837, as *res judicata*, and a bar to these proceedings.

William Brand, the tutor, answers that he, as tutor, is entitled to receive any sum of money that may be coming to the two minors, Frederick and Ann, whenever the same shall become due; and he prays for a judgment to be paid the amount coming to them, out of the sale of the mortgaged premises.

The Commercial Court was of opinion that a judgment of liquidation of the rights of minors, and a special mortgage given in accordance with the act of 1830, are so far binding on minors, in favor of third persons, that any purchaser of the property, so specially mortgaged, is only bound to pay the amount of the judgment of liquidation, with interest; and that, on paying that, he will hold the property free from all other claims of the minors, although they may show manifest error against them in the liquidation. The order of seizure was consequently restricted to the sum settled by the first judgment of the Court of Probates. The plaintiffs have appealed.

Benjamin and Preston, for the appellants. The power granted by law to the tutor to give a special mortgage, is for the advantage of the tutor, and restrictive of the rights previously granted to the minor, and should be strictly construed. The intention of the legislature was to restrict the minor's recourse in relation to the property on which he was to exercise his rights, but not in relation to the extent or amount of his rights. He has the same rights by law as when the mortgage was general, but must exercise them only on the property specially mortgaged.

The act of February, 1817, sec. 6, (see Bullard & Curry's

Digest, p. 590-1,) in authorizing the special mortgage to be given by a tutor, required no previous liquidation. The result was, that frequently mortgages were given on property of less value than the amount of the minor's claim. The act of 11th March, 1830, sec. 8, (Bullard & Curry's Dig., p. 809,) as a further protection for the minor, requires that the judge shall not accept the special mortgage without a previous liquidation, in order that he may decide whether the property will probably suffice to cover the minor's claim; but the law *no where limits the minor's rights to the sum thus liquidated*. This provision in his favor cannot be tortured so as to operate against him, especially when, by the very words of the law, sec. 1, the tutor is to give the special mortgage "for the security of the rights and property of his children, *and the faithful discharge of his functions as tutor*."

The very words of the act of mortgage itself in the present case, show that it was not intended to secure the re-payment of a particular sum only. The act of mortgage says that the mortgage is given "in order to secure the above mentioned sum of \$41,600 89, and *his faithful administration and performance of his duties as tutor of his said minor children*." Now his very first duty, as tutor, would be to correct, in favor of his children, the error of calculation of \$12,396 62, which is admitted to exist on the very face of the papers. Nor can any third person complain, who takes property subject to such a mortgage. He runs the risk of further sums being due, of a tutor's subsequent receipt of funds, or of any contingency which would make it his duty, "in the faithful performance of his functions as tutor," to pay a larger sum than that liquidated by the judgment of the Probate Court.

The question, in this case, is not new. In *Stafford and wife v. Villain*, 10 La. 329, this court decided, expressly, that a liquidation of accounts between the tutor and under-tutor, homologated by a decree of the Court of Probates, is not binding on the minor, who may, on coming of age, examine and contest all the accounts. See also *Lesassier v. Dashiell*, 17 La. 201. If the question were new, this court would not hesitate to repudiate a doctrine which would so readily lead to monstrous abuse, as that contended for by the appellees. Collusive liquidations of accounts between the the tutor and under-tutor would enable the former to release all

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his property from the general mortgage, and afterwards, by a sale of the property specially mortgaged, to cut off the minor's recourse even on that. In the present case, no collusion is pretended. Yet, on the face of the accounts, the minors are injured to the amount of \$12,396 62, as is admitted, by an error of calculation.

In relation to the interest, the right of the minors is *res judicata* by the judgment of the Court of Probates, which is not appealed from, and which cannot be collaterally attacked or inquired into. Besides, the law accords it to minors, and no offset is shown by the record. This point is directly decided in the case of Dashiell, 17 La. 201.

A. *Hennen*, for the third possessor and the tutor. The petitioners can obtain judgment only for the amount of the mortgage, taken by the Parish Judge to secure their rights in the estate of their mother. All formalities having been fulfilled in this act, and the amount ascertained by a judgment, nothing more can be recovered in this action. *Lalanne's Heirs v. Moreau*, 13 La. 431. *Lesassier v. Dashiell*, 17 La. 194. Acts of 1830, p. 46. The error in calculation, having received the sanction of the judge and become a judgment, and third parties, (the defendant, by mortgage,) having treated with the father, (the mortgagor,) and acquired rights under that judgment, the error of calculation cannot now be rectified to the prejudice of Erwin. *Muhlenbruch*, *Doctrina Pandectarum*, § 133. Just. Code, lib. 2, tit. 5, De Enore Calculi. Ib. lib. 7, tit. 52, c. 2, De Re Judicata. Ib. lib. 3, tit. 1, c. 2. *Flint v. Cuny*, 6 La. 67.

The petitioners are not entitled to interest on the amount of the sum due, except from the judicial demand, because : 1. Their tutor was bound to collect the interest annually, and having enjoyed the administration of the estate is presumed to have done so. 2. Their tutor was authorized to expend the amount of interest for the education and maintenance of the minors, it not being more than sufficient for that purpose. 3. The mortgage does not secure interest to the petitioners. 4. The law did not authorize the judge to grant any interest. 5. The tutor was authorized to compensate the expenses and education of the minors,

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with the revenues of their estate. 6. The usufruct of the minors' estate belongs to the father.

The defendant Wm. Brand, continues to be the natural tutor of his minor children not emancipated, though removed out of the State. *De la Croix v. Boisblanc*, 4 Mart. 715, 716. He cannot be deprived of the tutorship, at the suggestion of creditors, or of any one else. *State of Louisiana v. Judge of the Parish of Orleans*, 6 La. 365. The judgment of the court below deprives the defendant Wm. Brand, of his right of administering the rents and interest of the money due the minors, to whom he is still tutor, inasmuch as he can neither receive the capital nor the interest due them; and the judgment requires the whole to remain inactive until the minors are emancipated. The natural tutor is authorized to manage the estate of the minor, and to deduct *one-tenth* of the revenues as his commission; but the present judgment deprives him of these commissions. Civ. Code, art. 342. The tutor has no means to defray the expenses of the minor, as the judgment takes the whole of the revenues of the estate from his control, and he may have no means of his own to pay for their maintenance and education.

The judgment of the court below violates directly the provisions contained in the 341st article of the Civil Code, which declares that, "the tutor shall be bound to invest, in the name of the minor, the revenues which exceed the expenses of his ward, whenever they amount to \$500; in default thereof he shall be bound to pay on such excess the interest allowed by law;" and that "the investment of the funds of the minor must be made by public act, and secured by mortgage." Any interest on the capital due to the minors since 1837, the date of the mortgage, and all interest to accrue, should be paid to the tutor. The judgment of the court below should be amended accordingly. By the will of the mother of the petitioners, the management and control of the estate was to remain in the hands of the father, until the youngest child becomes of age; consequently the petitioners cannot, by this judgment, deprive the father of the enjoyment of any part of it until that event; and the judgment is erroneous in decreeing any thing to be paid to the minor emancipated by marriage, as the whole estate should remain with the tutor, and the will of the mo-

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ther be complied with, as she had the power by law to make such a disposition of her estate in favor of her husband, the defendant Wm. Brand.

The judgment of the court below is injurious to the interests of both the tutor and the minors, and should be reversed and rendered in conformity with the principles above stated. The tutor, Wm. Brand, if in possession of the money, as he ought to be, could place it out on mortgage, in the name of the minors, at ten per cent interest per annum. Under the judgment of the court below this advantage is lost to him and to the minors.

Benjamin, in reply. The tutor having withdrawn all his property from the operation of the minors' mortgage, except the property in question, which was specially mortgaged, and having then sold that property, complains with ill grace that he is not permitted to receive the amount coming to the minors from the sale of the property. If this money be paid to Wm. Brand now, his children will remain totally deprived of all security, as the general mortgage has been extinguished at his own instance, and the special mortgage will be extinguished by the sale. Under these circumstances, the court below could in no manner protect the minor, otherwise than by decreeing that the sums due to them should be retained by the purchaser to be paid to them at their majority.

The will of Ann C. Brand contains no such provision as is stated. It provides that the property "shall be held in common between Brand and his children, till the majority of the youngest child."*

* The will, after declaring that the father and mother of the testatrix are dead, and that she has three children living by her husband, Wm. Brand, proceeds :

"I hereby nominate and appoint my dear husband, William Brand, and George Green, executors of this my last will and testament. In the event of my death, I request that all the property held by me, by virtue of the community of *acquêts* and gains existing between my said husband and myself, shall be kept together until the full age of our last child, in the same manner that it may be in at the time of my decease; and that the same shall be rented or hired out by my said husband, for any price that he may deem advisable, for the benefit of the minors; and my said executors are fully empowered to act and do every thing that will tend to the benefit of my said estate, without the intervention of justice as far as possible.

"It is my wish that all my said children shall be well educated, out of such sum as may be coming to them from the community aforesaid.

- "Whatever portion of the community property may be coming to the minors herein

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Wm. Brand's very first step was to violate this provision, by having all the property adjudicated to himself; and he now pretends to claim the benefit of it.

BULLARD, J. This case presents the question, whether a special mortgage given by a tutor to secure the rights of his pupil, in pursuance of the act of 1830, is restricted to the amount found due to the minors at the time the mortgage was given, or whether, although restricted as to the property subject to it, it does not secure all that may be found due to the minor resulting from the administration of the tutor, up to the time of the majority or emancipation of said minor?

The act of the legislature of 1830, which authorizes the taking of such special mortgage, declares, that "tutors, &c. may, and they are permitted to give a special mortgage on immoveable property, not slaves, for the security of the rights and property of their children, and the faithful discharge of their functions." It requires the advice of a family meeting that the property offered to be specially mortgaged, is of sufficient value to *secure the rights* of said child or children, in capital and interest. It provides that, after the execution of said mortgage, all other property of the tutor shall be completely discharged from all legal, tacit, or other mortgage, arising from the tutorship. B. & C.'s Dig. 807.

Thus it appears that the object of the special mortgage is to secure the rights and property of the pupil, and the faithful administration of the tutor. It is a substitute for the general legal mortgage so far as the rights of the minor are concerned, and although termed a special mortgage, it is not necessarily special as to the amount of money it may be intended to secure. It is special as to the property subject to it, and *special* is the correlative of *general*. "A general mortgage," says the Code, "is that

named, and such others as may be born of our joint marriage, on the last child's becoming of age as aforesaid, I wish divided between them, share and share alike; but should all, or either of my said children attempt, in any manner, to interfere with this my last will, and require a separation of the property held in community aforesaid, before the time above specified, then, and in such case, whatever portion may be coming to them, I wish reduced to the smallest sum that the laws of the state will permit, and the amount, so taken from such child or children, I wish divided amongst the rest of the heirs, share and share alike."

which binds all the property present and future of the debtor. A special mortgage is that which binds only certain specified property." Art. 3255. The mortgage required by the act is conventional, as well as special. A mortgage may be stipulated for the fulfilment of any obligation whatever, even for the completion of a deed. Art. 3258. It may be given for an obligation which has not yet risen into existence, as when a man grants a mortgage by way of security for endorsements which another promises to make for him. Art. 3259.

It was clearly the intention of the legislature to secure to the minor the faithful administration of the tutor up to the moment of his final discharge, and, therefore, the amount secured by the mortgage is not necessarily to be ascertained at the moment the mortgage was executed. If other sums should come into the hands of the tutor, the property mortgaged would stand as security. The amount found due by a settlement in the Court of Probates, during the minority of the pupil, is not conclusive upon him. It may be examined into afterwards on settling the tutorship and rendering a final account. *Stafford et ux. v. Villain et al.*, 10 La. 319.

It was as clearly the duty of a faithful tutor to correct such an error as was discovered in this case, as it would be to recover from a third person the same amount discovered to be due after the execution of the special mortgage. In both cases the sum found to be due is the property of the minor, and its administration and final payment to the pupil, at his age of majority, are secured, in our opinion, by the mortgage in question.

Nor does this view of the case differ from that expressed in the case of *Casanova's Heirs v. Avegno*, 9 La. 192. In that case, and in several subsequent ones, we held that when the special mortgage has been accepted and recorded, the general mortgage resulting from the tutorship ceases to exist as to third persons; and that whatever error may have been committed in ascertaining the amount due to the minor, the mass of the property is validly released from the general mortgage so far as third persons are concerned. *Lesassier v. Dashiell*, 17 La. 194. The case of *Le Blanc v. His Creditors*, 16 La. 120, is to the same effect. All these cases establish the principle that the mass of the property is re-

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leased, as to third persons, by the execution of the special mortgage, but by no means restrict the special mortgage to the particular amount apparently due to the minor at the time it was given. As to such special mortgage, the terms of the mortgage itself notified third persons, that the property stood as the pledge of the minor, not merely for a particular sum, but for the faithful administration of the tutor.

We, therefore, conclude that the house and lot is mortgaged to the full amount found due to the minors by the last settlement in the Court of Probates. We cannot, however, accede to the prayer of the tutor, that the property may be sold for cash, and that the share coming to the children, yet minors, may be paid over to him. That would defeat one of the purposes of the mortgage itself, which was to secure his future fidelity in his administration, and would leave the minors without any security whatever. The property must be sold to make what is coming to E. J. Barnard, subject to the mortgage in favor of the other minors.

The judgment of the Commercial Court is therefore reversed; and, unless the defendant shall elect to pay the amount claimed by the plaintiff and to hold the property subject to the mortgage of the two minors, it is further ordered, the parties agreeing, that the same be sold for such amount in cash as may be required to pay the costs, and the balance of the price payable one-third in cash, and the remainder at the age of majority of the said minors respectively, or of their legal emancipation, in equal shares, bearing interest from the day of sale at five per cent per annum. That the cash installment be applied, so far as may be necessary, to pay the sum of \$9,430 23 to the plaintiff, Elizabeth Jane Barnard, assisted by her husband; the remainder of the price to be retained by the purchaser subject to the rights of said minors not emancipated, and secured by mortgage on the said house and lot; and that the appellee pay the costs of this appeal.

The State v. The Judge of the Court of Probates of New Orleans.

THE STATE v. THE JUDGE OF THE COURT OF PROBATES OF
NEW ORLEANS.

So long as a tutrix continues to act, her domicil is that of the minor.

Where the legal tutor of a minor changes his domicil after the tutorship has devolved upon him, the new domicil of the tutor will become that of the minor, for all purposes connected with the administration of the estate, and for the appointment of a successor in case of the tutor's death. *Aliter*, in France, where the tutor is dative. The office of under-tutor is always dative; and no law compels any one to accept such an appointment.

The resignation of an under-tutor must be addressed to the Court of Probates of the parish in which the minor has his domicil; and it is the duty of the judge of that court to accept the resignation when tendered, and to appoint his successor.

The answer to a rule to show cause taken against the judge of an inferior court, must be in writing, and filed with the clerk of the Supreme Court. No answer in person, or oral discussion will be listened to, except from the parties interested, or their counsel.

APPLICATION for a mandamus to the Judge of the Court of Probates of New Orleans.

BULLARD, J. The tutrix of Gabriel Fuselier, a minor, who resides and is domiciled in the city and parish of New Orleans, together with the under-tutor, who resides in the parish of St. Martin, unite in a petition, in which they state that the Court of Probates had ordered a family meeting to be held before a notary in this city, and that the said under-tutor had been notified to attend, but that, it being inconvenient for him to attend at so great a distance from his residence, he had petitioned the court to discharge him from his functions, and that the tutrix had united with him in a petition to that court to proceed to the appointment of another under-tutor in his place; but that the Court of Probates for the parish of New Orleans had refused both to discharge the said under-tutor, and to appoint a successor; and they pray for a mandamus. Whereupon a rule was taken on the judge to show cause why he should not proceed to discharge the present under-tutor, and to make a new appointment.

Bermudez, Judge of the Court of Probates of the parish of New Orleans, showed cause. The appointment of tutor and under-tutor to the minor, appertains exclusively to the Probate Judge of the parish of St. Martin, within whose jurisdiction the father was

born, lived, and died. Civ. Code, 289, 300. Code of Prac. 944, 945. If either wish to resign, the resignation must be tendered to the judge who appointed him. Civ. Code, 319. He alone can remove. Code of Prac. 1013. All causes of incapacity, exclusion, or removal of the tutor, apply to the under-tutor. Civ. Code, 325. Every act of a tutor or under-tutor, from the time of his appointment to that of his final discharge, is exclusively under the control of the judge from whom his appointment is held. The legislation of France is substantially the same with our own, as to the domicil of the minor, and the convocation and composition of family meetings. Magnin, No. 340, says :

Suivant l'article 406 (corresponding to art. 289 of the Civil Code of this State,) c'est le domicile du mineur qui règle la compétence du juge de paix, ainsi le siège du conseil de famille est de plein droit chez le juge de paix du domicile de la tutelle, (the domicil of the deceased father, says art. 944 of the Code of Practice,) à moins que par le droit de son pouvoir discrétionnaire sur ce point il n'ait désigné un autre local pour réunir les membres du conseil de famille. Code Nap. art. 413. Civ. Code, art. 308.

No. 74. *Lorsque le tuteur légal est décédé dans un endroit éloigné de son véritable domicile, cette circonstance ne change pas le lieu de l'ouverture de la tutelle, laquelle dès l'instant de son décès se trouve fixé dans celui de son domicile de droit ; ainsi dans ces exemples le juge de paix du domicile des père et mère, tuteurs de droit de leurs enfans mineurs, est seul compétent pour présider le conseil de famille.*

No. 78. *Lorsque le conseil de famille a été présidé par le juge de paix du domicile du tuteur légal, la compétence se trouve définitivement fixée devant le juge de paix ; ainsi le domicile du nouveau tuteur légal, quoique fort éloigné de celui de l'ouverture de la tutelle, ne change pas la compétence du juge de paix. Une fois que le conseil de famille a été présidé par un juge de paix compétent et légalement constitué, toutes les assemblées de famille pendant la durée de la minorité doivent continuer leurs délibérations devant ce juge de paix. Il serait contraire aux intérêts des mineurs qu'on pût, selon les changemens de tuteurs, porter successivement la délibération des conseils de famille devant le juge de paix du domicile de chacun des nouveaux tuteurs. Sur ce point*

la jurisprudence est uniforme. L' un des considérans de la Cour de Cassation, du 23 Mai, 1819, est remarquable. Il porte qu' on ne peut induire rien de contraire à la disposition de l' art. 108, [Civ. Code, 48,] suivant lequel le mineur a son domicile chez son tuteur, puisque cette disposition n'a pour objet de régler le domicile du mineur que pour la gestion du tuteur, d' où il suit que ce domicile cessant par la mort du tuteur, le domicile naturel du mineur reprend toute sa force et doit régir la nomination du tuteur. Qu'enfin, si la conseil de famille devait suivre les juges de paix des divers domiciles que pourraient prendre successivement les tuteurs, il pourrait s'en suivre l'inconvénient grave de soustraire les tuteurs à la surveillance naturelle du véritable conseil de famille, et de livrer le mineur à l'arbitraire des conseils étrangers à sa personne et indifférens à ses intérêts ; tandis que en général cet inconvénient cesse par l'attribution de toutes les nominations à un conseil de famille composé de la manière prescrite par les articles 407 et 409, et convoqué devant le juge de paix du domicile naturel du mineur conformément à l'art. 406.

Aux considérations de cet arrêt on peut ajouter, que l'ordre de l'administration de la tutelle exige que la minute des délibérations du conseil de famille, de tous les actes relatifs à la tutelle, soient dans le même dépôt, afin de se procurer dans un instant tous les renseignemens dont on a besoin sur l'administration des tuteurs."

Toullier, vol. 2, No. 1114. Sirey, year 1809, 29th Nov. p. 63. Ib. year 1819, 23d March, p. 523. Paillet, notes on art. 407, Code Nap. Duranton, vol. 2, *verbo*, Conseil de Famille. Dictionnaire Général et Raisonné de Droit Civil Moderne, *verbo*, Conseil de Famille, p. 384, No. 4. Delvincourt, vol. 1, p. 110, No. 5. Ib. p. 116, No. 4. Nouveau Ferrière, vol. 1, p. 438, *verbo*, Conseil de Famille. Journal du Palais, vol. 15, 20 Avril, 1820, p. 993. Ib. vol. 22, 24 Novr., 1829, p. 1548. Ib. 1838, vol. 2, 17th May, 1838, p. 436. Bousquet, vol. 1, p. 6.

BULLARD, J. The judge shows for cause: That the appointment of the tutrix and under-tutor of the minor, Fuselier, appertains exclusively to the judge of the parish of St. Martin, within whose jurisdiction the father of the minor was born, lived, and died., That both these officers hold their appointment from that judge. That if either the tutrix or under-tutor has any excuse to

offer for her or his resignation, or against her or his appointment, it must be proposed to the judge who appointed them.

These views of our learned brother are developed much at length, and sustained by several authorities from French commentators, and to a certain extent, and within certain limitations, we are satisfied that the weight of authorities would sustain the Court of Probates, if these questions were to arise in France.

In order not to be misunderstood, we will premise what is the position of the parties now before us, and what is demanded; and then examine the authorities to see what course ought, in our opinion, to be adopted.

The father and mother of the minor died in the parish of St. Martin, and the grandmother became his legal tutrix. She fixed her domicil in New Orleans, which all the authorities agree became the domicil of the minor. So long as the tutrix continues to act as such, so long her domicil is that of the minor. This is too plain to require a reference to authorities. If the tutrix were to die, the question would arise, whether the domicil of the minor would continue to be here, or whether it would revert, as it were, to the place of his father's death. But that is not now the question. Certain steps are to be taken relative to the administration of the minor's estate, and the question is, which court has jurisdiction, that of the tutrix's and minor's domicil, or that of the last domicil of the deceased parents? The authority of Duranton, to which the judge has referred us, is quite satisfactory on this point. After laying down the general rule, that the convocation of a family meeting is to be made by the judge of the *original* domicil of the minor, and not of the new domicil of the tutor, which he might charge at discretion, he says: "*L'être moral appelé tutelle aurait ainsi un domicile qui ne varierait pas. Cependant nous croyons que cette décision serait susceptible de modification pour le cas où ce serait le père, la mère, ou un autre ascendant, qui aurait changé de domicile depuis que la tutelle s'est ouverte en sa personne: dans ce cas, les convocations du conseil de famille pour autorisation et autres objets, devraient avoir lieu devant le juge de paix de son domicile actuel, qui est celui du mineur, autrement ce serait l'obliger à des déplacemens gênans et dispendieux. D'ailleurs il serait très possible, dans ce cas, que le mineur se trouvât avoir*

moins de parens ou alliés dans le lieu où demeurait l'ascendant lorsque la loi lui a déferé la tutelle, que dans celui où il a son domicile actuel. Ajoutez que à la mort de cet ascendant, la tutelle dative venant à s'ouvrir, c'est bien évidemment à ce nouveau domicile que le conseil de famille devrait être convoqué, d'après l'article 406, puisque le mineur n'en a pas d'autre." Cours de Droit François, liv. 1, tit. 10, § 453, vol. 3, p. 447. 3d Paris ed.

This authority is conclusive to show that, even in France, the *juge de paix* of the domicile of the *legal* tutor, or other ascendant, might act in a case like the present, and that on the decease of the legal tutor, a dative tutor might be appointed at the new domicile of the minor thus acquired, and who, says the author, would have no other. The rule may be different in that country where the tutor is dative, and fixes his domicile at a different place from the domicile of the deceased parents; and we are free to admit that this seems to be the settled opinion in France, according to the numerous authorities furnished us by the judge. Whether the positive enactments of our Code have not established a different rule, it is perhaps not necessary now to decide as to other cases which may arise; but it must not be overlooked that the judicial organization, and the condition and habits of the people of the two countries, differ materially. In Louisiana there is a court in each parish, whose peculiar duty it is to watch over and protect the minors within its jurisdiction, to provide them with tutors, and to see that they administer faithfully. The positive rule established by the Code is, that the domicile of the minor is that of the tutor. In Louisiana there does not exist the same stability in the population. In France the emigration of families from one department to another in hopes of bettering their condition, are supposed to be rare, compared with the constant changes which are taking place in this country. But wherever such minors may go, in whatever parish they may settle, they find the same paternal guardianship, exercised it is true, by a different magistrate, but governed by the same laws, and standing equally in relation to them, *in loco parentis*. If the minor has left behind him in the place of his birth most of his relations, he finds, wherever he goes, disinterested friends, capable and willing to advise him and those who administer his estate, and this, too, without the hope of remote

advantage to themselves. Such advisers will be generally found after all, to be the safest. In a new country where lands are cheap, and marriages fruitful in consequence of the extreme facility of procuring subsistence, large families of children, as they grow up, instead of dividing and sub-dividing their paternal acres, sell out to one or two, and move to some new and remote settlement, where the same process is repeated. The laws of the country adjust themselves to this condition of things, and to the habits and character of the population. But in the present case if the minor had been born in Tours, and the legal tutor had fixed his domicile at Paris after the tutorship devolved upon him, the latter would have been, even by the French law, the domicile of the minor connected with the administration of his estate, and even for the appointment of a successor in the event of the tutor's death. But the judge further answers, that it is not to the Court of Probates for the parish and city of New Orleans, that the under-tutor should apply to be excused from serving, and he relies upon article 325 of the Civil Code, which declares "that all the causes of incapacity, exclusion, and removal of the *tutor*, apply likewise to the under-tutor." But it does not appear to us that this is a question either of incapacity, exclusion, or removal. It seems to us rather as resolving itself into the question, whether one can be compelled to serve as under-tutor; for he who cannot be compelled to serve, may, at any moment, resign, and we have no doubt that the resignation must be notified to the judge of the domicile of the minor. That part of the Code which treats directly of the appointment of the under-tutor, does not provide that any class of persons shall be compelled to act as such; and the article above quoted is found in that section of the Code which treats of the *incapacity, exclusion, or removal* of tutors, and not in that which treats of the persons who may be *excused* from acting. The office of under-tutor is, essentially, and always *dative*, and we know of no provision of law which compels any citizen to accept such an appointment, more especially where his domicile is different from that of the minor. We cannot but regard the office in this case as vacant, by the resignation of the under-tutor, signified in a formal manner by petition, and that it is the duty of the Court of Probates to make the appointment.

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We take this opportunity to remark that, on this, and on some other occasions, the judges have come in person to answer rules to show cause, and to explain their views orally. We are always disposed to listen respectfully to what may be urged, because we have no object in view but truth; but we consider the practice irregular. The answer should be in writing, filed with the clerk, with such reference to authorities as may appear suitable; and, hereafter, we will not listen to any oral return or discussion, except from the parties interested, or their counsel.

After an attentive consideration of the subject, and the authorities brought to our notice we reach the same conclusion we did in the case of Annette Fortier, 14 La. 478, that it is the duty of the Court of Probates for the parish and city of New Orleans to proceed and appoint an under-tutor.

Rule made absolute.

ARCHIBALD P. HOWE v. JOHN FRAZER.

The surety in an appeal bond, who pays the amount of the judgment obtained against his principal, will, under art. 2157 of the Civil Code, be legally subrogated to all the rights of the plaintiff whose claim he has satisfied, and may, on a rule to show cause being made absolute, take out a *fi. fa.* against the bail in the suit, whose liability has been fixed, for the whole amount paid by him.

Under art. 2157 of the Civil Code, subrogation will take place, of right, in favor of one who has paid the debt he was interested in discharging: *first*, where he was bound for another; *secondly*, where he was bound with another; and *thirdly*, where he was bound for the same debt for which another was bound. The two first cases are provided for expressly; and subrogation will be implied in favor of the person bound for the debt for which another was bound, on the presumption that he was induced to bind himself in consequence of the responsibility of the principal having been guarantied by the party first bound.

He who is bound for another, or for the same debt as another, and pays the creditor, is subrogated to all the rights of the latter against the principal; but as to those with whom he is bound, he will be subrogated only for their virile portions.

APPEAL from the District Court of the First District, Buchanan, J. Howe having recovered \$500 damages, in an action of slander against Frazer, the latter appealed, and the judgment was affirmed. (14 La. 375.) On the 28th of February, 1840, a *fi. fa.* was

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issued against Frazer, and on the 9th of April the sheriff returned that no property had been found, after demand, &c. On the 13th of April a *ca. sa.* was taken out against him, and on the 18th June the sheriff returned that he could not be found. A rule was then taken by the plaintiff on Walker, the security on the appeal bond, to show cause why he should not be condemned to pay the amount of the judgment with costs, which was made absolute on the 4th June. A *fi. fa.* issued against the security, Walker, was returned on the 19th August, no property found. On the 21st of November the plaintiff took a rule on Norbert Vaudry, the security on the bail bond, to show cause why he should not be condemned to pay the judgment and costs, the *fi. fa.* having been returned unsatisfied, and the *ca. sa.* not found, which rule was made absolute on the 21st of December. A *fi. fa.* against Vaudry was returned on the 2d of March, 1841, no property found. An *alias fi. fa.* was issued against Walker on the 3d of September following, and on the 18th of November returned, satisfied by him. On the 14th of January, 1842, Walker took a rule on Vaudry to show cause why he should not be subrogated to the rights of the plaintiff against the latter, on the ground of his having paid the debt, and why a *fi. fa.* should not be issued against him, which was made absolute on the 3d of March. From the judgment making this rule absolute, Vaudry has appealed.

Bartlette, for the surety on the appeal bond.

Grivot, for the appellant. Vaudry was discharged from liability on the bail bond by the act of 28th March, 1840, abolishing imprisonment for debt. 17 La. 476, 509. By paying the debt, the surety on the appeal bond was not legally subrogated to the rights of the creditor against the bail. The former cannot be said to have bound himself on the faith of the bail; he trusted to the debtor only.

MARTIN, J. N. Vaudry is appellant from a judgment subrogating Walker to the rights of the plaintiff on a judgment obtained by the latter against Vaudry as bail of the defendant. The facts of the case are these: Walker became surety for the defendant on an appeal from the judgment in the case in which Vaudry was bail. The judgment having been affirmed, he paid its amount. In the meanwhile, Howe had obtained

judgment on the bail bond, executed by Norbert Vaudry in the original suit against Frazer. Walker contends that having paid for his principal in the appeal bond the judgment obtained against the latter by Howe, he was legally subrogated to all his rights, and consequently to those against Vaudry, as bail of the defendant. The subrogation is claimed as a legal one, and can only be so under that part of art. 2157 of the Civil Code, by which it is given "to him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it." Both Walker and Vaudry were bound *for* Frazer. If they be bound with each other, it can only be because they are bound for the same person. He who is bound for another, and pays the debt, is subrogated to all the rights of the creditor against the principal. But as to those with whom he is bound, if there be any, he is only subrogated for their virile part. It is not very clear that the parties are bound with each other, for they did not bind themselves together. They were, however, certainly bound for the same debt, which forms a third category, the first being a binding *for* another, the second *with* another, the third *for the same debt* as another. The Code has certainly made an express provision for the two first, and the question is, whether there is an implied one for the third. The reason for saying that the subrogation is implied in favor of the party who becomes last bound is, that he was induced to undergo the responsibility because the principal's solvency was guaranteed by the person who first bound himself for him. This reason appears cogent. The person who first binds himself gives credit to the principal, and would wrong him, who under faith of this, superadds his responsibility, if the former declined to comply with his engagement to satisfy the debt if the principal does not. The same reasons which militate against the first accessory obligor so as to charge him with the whole debt, militate with perhaps little less force against his being charged with one-half of it only.

Judgment affirmed.

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SUCCESSION OF MARIA JOSEPHA ROBERT—LOUIS PILIÉ, Dative Testamentary Executor, and another, Appellants.

Under art. 1682 of the Civil Code, a Court of Probate cannot refuse to order the execution of a foreign will, when shown to have been duly proved before a competent judge of the place where it was received. The object of the law is to give to foreign wills the same effect in the State, which they would have in the country in which they were executed, where they have been duly proved in the latter. But where an olographic will has been received by a foreign tribunal without proof of the writing or signature, such proof not being required by the laws of the country unless the genuineness of the will be attacked, it cannot be executed here, without being first proved according to law, before the proper court in this State.

Where by the laws of the country in which a foreign will was executed, the original cannot be removed, the will may be ordered to be executed here, when the original has been duly proved before a competent judge of the place where it was received, on the production of a duly certified copy of the record of the proceedings and of the evidence taken before the foreign tribunal, without the production of the original will; and where the testament, being olographic, and its genuineness not having been attacked, the original was received abroad without proof of the writing or signature, it will be ordered to be executed here on the production of a certified copy thereof, and of testimony taken abroad, under a commission, establishing the genuineness of the original.

A minor, not emancipated, who had lived abroad for fifteen years, but who was born in this State, where his tutrix resides, is domiciled here. A minor, not emancipated, can have no other domicile than that of his father, mother, or tutor. C. C. 48.

A domicile of choice can only be acquired by one who is *sui juris*; consequently it cannot be acquired by a lunatic or minor.

The consent of the tutor to the marriage abroad of an unemancipated minor, does not authorize the latter to change her domicile. Actual emancipation by marriage, could alone effect a change. Until the act or event which gives the minor the right to change his or her domicile has taken place, the domicile of the father, mother, or tutor, must be considered that of the unemancipated minor.

As to moveables, the capacity or incapacity of a testator must be determined by the law of his domicile.

A bequest by a testatrix, a minor natural child, without descendants or ascendants except her mother, domiciled in this State, where all her property, with the exception of her apparel and furniture, was situated, but who had lived for many years in France, where she made her will and died, to one whom she intended to marry, "of all which the law permits her to dispose of," will be construed to have been made with reference to the law of this State, by which the whole of her estate will go to the legatee, and not to that of France, by which she could have disposed of but one half.

APPEAL from the Court of Probates of the Parish of New Orleans, Bermudez, J. Maria Josepha Robert, a natural daughter

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of Geneviève Robert, a free woman of color, was born in New Orleans the 30th of July, 1816, and, with her mother's consent, went to France in 1822, where she remained until her death, in June 1837. She died unmarried, without descendants. In 1828, a legacy exceeding \$6000 accrued to her from the will of one Dupuis, for the payment of which certain notes were given by the heirs of the latter. M. J. Robert left an olographic will in the following words :

"Je donne et lègue à Monsieur Gustave Allier que je dois épouser, tout ce dont la loi, me permet de disposer. Betz, le vingt Mai, mil huit cent trente sept.

MARIA JOSEPHA ROBERT."

Proceedings were had, at the request of the universal legatee, before a French tribunal, and on the 18th of July, 1837, the testament, and its envelope were ordered to be deposited in the office of a notary public, appointed by the president of the tribunal. An inventory of the estate was made. The will was not proved in France, by the laws of which country the hand-writing and signature of an olographic will are only required to be proved when its genuineness is attacked. A copy of the will from the office of the notary with whom it was deposited, was afterwards presented to the Judge of the Court of Probates, by Louis Pilié, the agent of Jean Charles Gustave Allier, the universal legatee. The court ordered it to be recorded, and executed, and appointed Louis Pilié dative testamentary executor. On an appeal from the Commercial Court in the case of *Robert v. Allier's Agent*, 17 La. 4, it having been decided that the proceedings had in France did not amount to the proof required by art. 1682 of the Civil Code, and that the will could not be carried into effect without being proved before the Court of Probates of New Orleans, the testimony of three witnesses was taken, under a commission, in France, by whom the genuineness of the will was established. The testimony of the notary with whom it was deposited, taken under the commission, also proved, that, by the laws of France, the original will could not be taken from his office. On the return of this commission, the order for the registry and execution of the will and the appointment of Pilié as dative testamentary executor, was ratified and confirmed, and the notes given for the legacy of Dupuis ordered to be delivered to the executor, to be administered by him as

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the property of Maria Josepha Robert. The executor subsequently presented a petition to the Court of Probates, alleging that he had administered on the estate, which owed no debts except the costs of settlement, and that, under the will, the whole of the property, after deducting the costs, belongs to Allier, and praying that a tableau, made in conformity, might be homologated, and for his discharge. Geneviève Robert, reserving her right to appeal from the order for the execution and registry of the will, opposed the homologation of the tableau, alleging that, even if the will should be declared to be valid, she would still be entitled to one half of the succession; and she prayed for its amendment accordingly. The judge of the lower court having ordered the opponent to be placed on the tableau as entitled to one half of the succession, the executor appealed.

By agreement of counsel the whole case is submitted to the court, as if an appeal had been taken from the judgment ordering the execution of the will and the delivery of the notes to the executor.

L. Janin, for the appellants. It is admitted that the commission which was executed in France, establishes, by the clear and precise testimony of three witnesses, the genuineness of the testament. The notary in whose office it was deposited by order of court, testifies that the law would not permit him to part with the original. Such is also the law of Louisiana.

The appellee contends that the execution of an olographic testament can only be ordered in this State, when the original is produced, and proved by witnesses known to the judge, and appearing before him in person. Civ. Code, art. 1648.

If this were true, the olographic testament, the most favored by our law because the least exposed to fraud, would be most easily defeated. Arts. 1648 and 1649 are not negative laws. They provide for the more common case, where the testament itself, and competent witnesses can be produced before the court, and prescribe the mode of proceeding in that case. They do not say, that the will shall be proved in no other manner. In the same manner all other laws enacted by our legislature concerning the evidence required in support of a claim, contemplate the presence of the witnesses and express themselves accordingly. But it can-

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not be denied that it is an universal principle of our civil jurisprudence, that whatever can be proved by oral testimony, can be proved also by commission. The general principle once established, it was not necessary to allude to it, whenever the subject of proof was touched.

Whatever proof satisfies a foreign tribunal, is conclusive, in this State, of the genuineness of the will. Should less weight be given to the testimony obtained under the supervision of our own courts, and amounting to the degree required by our law? The Code lays down general rules, and does not, nor could it trace out the endless complications of human affairs. The liberal provisions of arts. 1581, 1681, 1682, are quite incompatible with the narrow policy advocated by the appellee. According to her views, if it be imagined that the jurisprudence of other countries resembles our own on this subject, a testament which might affect property in ten different countries, would be inoperative in nine out of the ten, if the law of the country where it was first produced, should require it to be deposited in a public office.

The appellee maintains, that the testatrix was still a minor between twenty and twenty-one years of age; that the capacity of disposing *mortis causa* of moveable property, is determined by the law of the testator's domicile; that the testatrix was domiciled in France; that by the laws of that country a minor over sixteen years can dispose only of one-half of her property (Code Nap. 904); and that, therefore, admitting the validity of the will and the sufficiency of the proof of its execution, one-half of the estate would still go to the appellee, who is the natural mother of the testatrix.

The domicile of the testatrix was not in France, but in Louisiana. In respect to moveable property, the law of the domicile of the testator determines his capacity or incapacity. Story, 391. 4 Burge, 579. But Maria Josepha, the minor testatrix, although she resided in France, had her domicile in Louisiana, where she was born, and where her natural mother and tutrix, had always been and was then residing. A minor can have no other domicile but that of his father, mother, or tutor. Our law, Civ. Code, art. 48, is express on the subject; nor does it differ from the laws of other countries. Story, 44. 1 Burge, 38, says, "the domicile of choice being that which the person himself establishes, it can only be acquired by

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him who is *sui juris*. It cannot, therefore, be acquired by a lunatic or a minor." Burge quotes Voet. lib. 5, tit. 1, No. 100. Pothier, Introduction aux Coutumes, 3.

The grounds relied on for inferring a change of domicile are, that the testatrix was sent very young to France to receive her education, and remained there fifteen years, and that the mother and natural tutrix consented to her projected marriage with Allier. On the last circumstance most stress is laid. It was a consent to an act which would have produced a change of domicile. The change of domicile would not have been effected, except by the marriage. As there can be no such thing as a constructive marriage, so there can be no constructive change of domicile by a marriage which, though contemplated, does not take effect. The wife loses her original, and acquires the husband's domicile, because she is *en puissance de mari*. The mother, by consenting to the marriage, cannot be considered as having affected the domicile of her daughter, for if the marriage took place, the mother lost all control over her daughter's domicile, and if it did not, then the consent, which was clearly a conditional one, must be looked upon as withdrawn on account of the failure of the condition.

Finally, it is said, that although the testatrix's domicile should be considered to have been in Louisiana, still her intention and the construction of the will is to be governed by the law of the country where she resided *de facto*.

The will is in these words: "*Je donne el lègue à Monsieur Gustave Allier, que je dois épouser, tout ce dont la loi me permet de disposer.*" If we were right in saying that the capacity of the testatrix is governed by the law of her domicile, (as to moveables,) and this is granted, and that her domicile still was in Louisiana, then this pretension of the appellee is entirely unsupported. The words of the testament leave it doubtful to what law the testatrix referred. Every one is presumed to know the law affecting his acts, and the testatrix, in the absence of proof to the contrary, must be presumed to have referred to the law of Louisiana, and to have known that she was governed by that law, though she might not have known how far that law restrained her capacity of disposing. But the appellee calls upon the court to presume, that the testatrix did not know by what system of laws her case was governed. "The

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law of the place of the domicile in many cases affords the rule of construction, when the testator has used expressions, which are either ambiguous, or of different significations in different countries." 4 Burge, 590. 2 Id. 853. The testatrix intended to bequeath all her property, without exception, to Allier, her lover and intended husband. She had no property in France beyond her wearing apparel and some furniture, as is shown by the inventory made in France.

Benjamin, contra.

SIMON, J. This controversy arises out and is the sequel of the case decided by this court between the same parties, and reported in 17 La. 10. The parties went back to the Court of Probates, to proceed on the rule which we thought necessary to notice in our former decision, and which had been taken by the dative testamentary executor, during the progress of the previous litigation before the Commercial Court. The first step that was taken before the court *a qua*, after the rendition of our decree, was the issuing of a commission to prove the hand-writing of the testatrix in France. Three witnesses were examined, from whose testimony no doubt can be entertained as to the genuineness of the testament; wherefore it was ordered by the inferior court, that the rule taken by the testamentary executor should be made absolute, and that the proceeds of the several notes originally in dispute between the parties, should be paid over to him, to be by him administered as property belonging to the estate of Maria Josepha Robert, reserving to Geneviève Robert the right of claiming whatever amount she might be entitled to under the will.

A few days after this decree was rendered, the executor filed an account or tableau, in which, after deducting the privileged costs and expenses, he disposes of the balance of the funds in his hands in favor of the universal legatee. The testatrix' natural mother, being entirely excluded, filed an opposition to this tableau on the ground that, supposing the will to be valid and executory, she is nevertheless, entitled to inherit one-half of her daughter's estate. This opposition was sustained by the judge *a quo*, who ordered the tableau to be so amended as to place the opponent thereon as entitled to one-half of the residuum of the estate, and Gustave Al-

lier to the other half; and from this judgment, the dative testamentary executor, and the universal legatee have both appealed.

The appellee has prayed, in her answer to the petition of appeal, that the judgment ordering the execution and registry of the will may be reversed, and the succession of her deceased daughter decreed to belong to her as legal heir.

This case presents three distinct and important questions of law for our consideration, to wit: *First*, was the olographic testament in question sufficiently proven before the Court of Probates, although the original will was not produced and recorded?

Second, Where was the legal domicile of the testatrix, who was a minor, above sixteen years of age, at the time the will was executed?

Third, By what law is her capacity to dispose to be governed, and under what law is the extent of her disposition to be determined and ascertained?

I. The genuineness of the will cannot be contested, as it is established by the clear and positive testimony of three witnesses, well acquainted with the hand-writing of the testatrix; and the notary in whose office it was deposited by order of a French tribunal, testifies that the law of France does not permit him to part with the original. This provision of the French law is, in this respect, similar to our own. Civ. Code, art. 1650. Code of Prac. art. 941. So that there is clearly an absolute impossibility of procuring the original of the will under consideration, and of producing it for the purpose of being deposited in the probate judge's office according to law. But is this uncontrollable circumstance to have the effect of defeating the olographic will of the deceased? We think not. We said in our first decision, 17 La. 18, that "the judge of probates ought not to order the olographic will of Maria Josepha Robert to be carried into effect, without its being first proved before him according to law, *unless satisfactory evidence is produced to show that it has been duly proved in France.*" This opinion was based on art. 1682 of the Civ. Code, in which it is positively enacted that our courts cannot refuse to order the execution of a foreign will, if it be established that it has been duly proved before a competent judge of the place where it was received. Surely, it would be vain to contend that the proof here

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produced would have been insufficient in France, if required there, to establish the genuineness of the will ; and why, if sufficient there, should not such proof be considered as conclusive in this state ? Less weight or effect ought not to be given to the testimony obtained under the supervision of our own courts, than to evidence taken in a foreign country, to satisfy a foreign court ; for, if under the law of France, it had been required to prove the genuineness of the will in question, its execution would have been ordered here on the mere production of a duly certified copy of the record of the proceedings had, and of the evidence received before the competent French tribunal, without the necessity of producing the original will. The policy of the art. 1682 is very obvious. Our law, on this international subject, seems to have intended to give the same effect to foreign wills in this State, as they would have in the country in which they were received or executed, provided they have been duly proven there ; yet, it is agreed that where no proof has been adduced in a foreign country, because the law of that country did not require it, we should not be satisfied with the same degree of evidence that would have been sufficient to satisfy the foreign tribunal, and even our own courts under the first branch of art. 1682, and that we should exact a compliance with an impossibility. We cannot assent to this proposition. The main object of our law on this subject, is to guard and protect our citizens against any fraud that might be committed to their prejudice, if it did not require the proof of the genuineness of foreign wills ; but when this has been satisfactorily established, such object is undoubtedly obtained, and it would be superfluous to require more.

It has been insisted, however, that arts. 1648 and 1649 of our Code show that the original will ought to be produced, in order to be identified with the testimony of the witnesses who have recognized it, and that, in its absence, the evidence would be incomplete. This position would perhaps be correct, if the witnesses were in personal attendance before the Court of Probates ; but these articles are not negative laws ; they do not say that no other kind of proof shall be admitted ; and we doubt very much whether, under their application, if an olographic testament executed here, had, by some accident, been destroyed before being legally proved,

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a true copy of it, identified with the original by the testimony of two credible witnesses who had seen both, and who would be able to swear to the genuineness of the original in the manner pointed out by law, should not be considered as a sufficient compliance with the provisions of our Codes. Surely, we are not prepared to say that, in such a case, the legal rights acquired under the will would also be defeated, and that the party would be left without remedy. This is indeed an analogous and even a stronger case; and as, in our opinion, our law makers cannot have intended to require an impossibility, we must conclude that, under such circumstances, the proof furnished by the appellants, is a sufficient compliance with the requisites of the Codes, and that the inferior judge did not err in ordering the execution of the will under consideration.

II. The testatrix was a minor above sixteen years, under the authority of her natural mother, when she executed the testament, and although she resided in France, where she had been sent for the purpose of receiving her education, it cannot be controverted that she had her legal domicile in Louisiana, where she was born, and where her mother and tutrix was then residing. Under our law, Civ. Code, art. 48, it is clear that a minor, not emancipated, can have no other domicile but that of his father, mother, or tutor; and in this respect, it does not differ from the laws of France. Code Nap. art. 108. Story, Conflict of Laws, No. 46, says, that the place of birth of a person is considered as his domicile, if it is at the time of his birth, the domicile of his parents; and this is called the domicile of nativity. But if he is an illegitimate child, he follows the domicile of his mother. *Ejus, qui justum patrem non habet, prima origo a matre.* Digest, lib. 50, tit. 1, l. 9. This domicile of birth of minors continues until they have obtained a new domicile; and Burge, 38, says, that "the domicile of choice being that which the person himself establishes, can only be acquired by him who is *sui juris*. It cannot, therefore, be acquired by a lunatic or a minor." Burge quotes Voet, lib. 5, tit. 1, No. 100. Pothier, Introduction aux Coutumes, 3.

But it is urged that the testatrix' domicile was changed, because she had resided about fifteen years in France, and because her mother had consented to her projected marriage with Gustave Al-

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lier ; and this last circumstance is construed as a consent to an act which would have produced a change of domicil. It is true that this event was in contemplation, and, if it had taken place, would have had the effect of emancipating the testatrix ; but it never did happen, and consequently she never was emancipated. Now, our law, art. 48, speaks of the domicil of minors *not emancipated*, and thus, it is clear that nothing but an actual, and not a projected emancipation, could operate so as to authorize her to change her domicil. Story, No. 46, says, minors are generally deemed incapable, *proprio marte*, of changing their domicil during their minority, and therefore retain the domicil of their parents. This is undoubtedly a correct doctrine, which we have often had occasion to recognize ; and it is meet for us to establish as a settled and general rule, that until the act or the event which is to have the effect of giving to a minor the right of changing his former domicil, and of selecting and acquiring a new one, has taken place, the domicil of the parent or tutor must be considered as that of the unemancipated minor.

III. It is first necessary to remark, that the estate of the testatrix is composed exclusively of moveables ; and it is undoubtedly a clear and correct principle on the subject of the conflict of laws, that, with regard to moveables, the capacity or incapacity of a testator is to be determined by the laws of his domicil. Story, No. 283, says, "It follows as a natural consequence of the rule which we have been considering, (that personal property has no locality,) that *the laws of the owner's domicil* should in all cases determine the validity of every transfer, alienation, or *disposition*, made by the owner, whether it be *inter vivos* or *post mortem*." This rule is established by the learned judge on the authority of several distinguished jurists and commentators, who use language equally general and exact. Among whom we find Pothier, Merlin, and others, who all agree in asserting the principle to be so well established, that no one has dared to question it ; and there is, says Judge Story, an entire harmony on this point between foreign and domestic jurists.

But it has been strenuously contended that although the testatrix' legal domicil was in Louisiana, and although her capacity to dispose of her moveable estate is to be governed by the law of

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her domicil, her will ought to be construed, and her intention ascertained and determined in reference to the law of France, where the testatrix intended that her will should take effect. The disposition in controversy is in these words: "*Je donne et lègue à M. Gustave Allier, que je dois épouser, tout ce dont la loi me permet de disposer.*" If this disposition *mortis causa* is to be regulated by the laws of Louisiana, the whole of the estate of the deceased will go to the universal legatee (Civ. Code, art. 1464); whilst under the law of France, he would only be entitled to one-half thereof. Code Nap. art. 904. Now, it seems to us clear, that the testatrix intended to bequeath all that she was capable of giving, and that nothing in her disposition, or in the expression of her last will, indicates that the law by her alluded or referred to, if indeed she alluded or referred to any particular law, was the law of France rather than that of Louisiana. It is true her residence *de facto* was in France, but she had no property there, beyond her wearing apparel and some furniture; and if she had really intended to dispose according to the law of that country, would it not have been easy for her to ascertain exactly the extent of her capacity there? Her disposition shows an entire ignorance of the law that was to govern her capacity; and we may fairly presume that she did not know which was to have that effect. But certain it is that it evinces clearly the intention of bequeathing to her universal legatee, to her lover, to her intended husband, all she could legally give him, and the whole of her estate if it happened that she was by law permitted to do so. Her will contains no restriction, no limitation. Her intention was undoubtedly to dispose to the full extent of her legal capacity; and if so, how could her intention be separated from her capacity? Is not the one, on the contrary, closely connected with the other? We think so; and as, from the expressions used in the will, it cannot be doubted that the testatrix intended to carry her liberality to the full extent of the law that was to govern her capacity; and as it is a settled rule that such law is that of her domicil, which was in Louisiana, we are constrained to conclude that her disposition must prevail as a legacy of her entire moveable estate.

Under this view of the question, that part of the judgment of the

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inferior court, allowing one-half of the estate of the deceased to her natural mother, must be reversed.

It is, therefore, ordered, that the judgment of the Court of Probates, commanding the will of Maria Josepha Robert to be executed, be affirmed; that the judgment subsequently rendered and appealed from, be annulled; that the opposition filed by the testatrix' natural mother, be overruled; and that the account or tableau filed by the dative testamentary executor, be homologated and approved. The costs in both courts to be borne by the opponent and appellee.

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A bequest of a sum of money "to the orphans of the First Municipality of New Orleans," may be claimed and recovered by the City Council of that Municipality, who are authorized to regulate its distribution among the objects of the testator's bounty. C. C. 1536.

In regard to the creditors of a succession, the administration of the assets and the payment of the debts of the deceased must be governed exclusively by the law of the country where the administrator or executor acts, and from which he derives his authority to collect the assets. No provision of the will could subject them to the necessity of seeking payment elsewhere. Otherwise, as to legatees, who have no claims against the succession but such as the testator pleased to give them, who might make his bounty conditional. They must take their legacies, if at all, *cum onere*.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

MORPHY, J. Joseph Claude Mary, formerly a resident of this city, died at Vichy, in the kingdom of France, leaving a will, the proper interpretation of which gives rise to the present controversy. Among divers legacies which he makes to persons residing in this country and in France, is one of \$5000 to the orphans of the First Municipality—*aux orphelins de la Première Municipalité*. After these bequests, the will contains the following clauses, to wit:

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“ Je nomme pour mes exécuteurs testamentaires pour tous les biens que je possède aux Etats Unis, Messieurs Antoine et Zénon Cavelier, frères, demeurant à la Nouvelle Orleans, qui voudront bien accepter ma confiance, et que je charge de vendre à l'encan mes biens situés aux Etats Unis, moins la maison que j'ai léguée à Monsieur Laurans.

“ Je nomme, pour les biens que je possède en France, mon exécuteur testamentaire Monsieur Laurans, mon légataire, auquel Messieurs Cavelier remettront le prix provenant de la vente de mes biens d'Amérique ; et le dit M. Laurans, en sa qualité d'exécuteur de mes volontés dernières, recevra, outre le prix de la dite vente, le capital en numéraire que j'ai placé chez Monsieur Jules Béchet aîné, mon banquier à Paris, rue Chaussée d'Antin, No. dix-neuf bis, ainsi qu'une somme de quarante mille francs, (huit mille gourdes,) que j'ai en hypothèque sur une maison sise à la Nlle. Orleans, et placée en mon nom par mon dit banquier.

“ Enfin je veux et ordonne que, si après l'acquittement de tous mes legs, il reste du disponible, ce disponible soit réparti entre tous mes légataires proportionnellement à la valeur de chacun son legs, leur léguant à cet effet ce reliquat.”

In pursuance of these provisions of the will, Antoine and Zenon Cavelier proceeded to sell all the property the sale of which was ordered by the testator, and filed in the Court of Probates an account of their administration, showing the money and notes on hand. This account sets forth the legacies made to persons residing here, and expresses the intention of the executors to have the notes discounted under the authorization of the court, and to deliver over to Pierre Laurans the balance remaining, after the payment of the debts. To this account various oppositions were made. Our attention has been called only to the two which were sustained by the judgment appealed from. *First*, That of the New Orleans Catholic Association for the relief of Male Orphans, the object of which is to have it decreed that this corporation was the particular legatee intended by the testator, when he bequeathed \$5000 to the orphans of the First Municipality. *Secondly*, That of the legatees residing here, who contend that their legacies are to be paid in this city, and that they cannot be subjected to the trouble and expense of seeking their payment

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in a foreign land, when there are means in this country to satisfy them.

In relation to the first opposition, the judge below has declared himself satisfied, from the evidence adduced, that the intention of the testator was that the New Orleans Catholic Association for the relief of Male Orphans should reap the benefit of the bequest of \$5000, made by him in favor of the orphans of the First Municipality of New Orleans. Such an intention does not surely result from the terms of the will. • The bequest is in favor of the orphans of the First Municipality, without any restriction as to sex or any other circumstance. How then can it be claimed as made to the male orphans, or to any other class of orphans, or to any particular corporation? As to the evidence showing the intentions of the testator, it consists wholly of the testimony of one witness, Gabriel Correjollès, who declares that he and the deceased were old friends, and were in the same company during the war of 1814. That at the time of Mary's last visit to this city, the New Orleans Asylum was at Blanc's house on the Bayou St. John, and continued to be kept at the same place until after his departure for France; that, from conversation with Mary, he thinks that he was a catholic, and that the Asylum was commonly called the Catholic Asylum. That he (the witness) knows of no Orphan Asylum existing at that time, or even now in the First Municipality, except the one alluded to, which has since been removed from it.

In these facts we can see nothing which points exclusively to the opponents, as the persons whom the testator had in view. The existence of this corporation at the time the testator visited New Orleans, and the fact of his being himself a catholic, are, in our opinion, insufficient to control the clear and plain words of the will, that the donation is made *to the orphans of the First Municipality*. It appears to us that the account should not be amended in this respect; and that, under article 1536 of the Civil Code, the City Council of the First Municipality will be competent to claim and receive the legacy, and regulate its distribution among the intended objects of the testator's munificence to be found within the limits of the First Municipality.

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On the second question, arguments have been urged which would have had their due weight, if offered by the creditors of the estate. It is well established in regard to them, that the administration of the assets of deceased persons, and the payment of the debts are to be governed altogether by the law of the country where the administrator or executor acts, and from which he derives his authority to collect such assets. No provision of the will could subject them to seek elsewhere their payment. But the case is quite different with respect to legatees, who have no claims against the estate, except such as it has pleased the testator to give them. He, surely, was at liberty to attach conditions to his bounty. The legatees must take it *cum onere*, though they may renounce it, to be sure, if the conditions annexed to it appear to them too burdensome.

As to the intention of the testator that his executors in Louisiana should act as they propose to do, we cannot entertain a doubt. He expressly directs his executors, A. and Z. Cavelier, who had been his agents here, to sell at auction all his property in Louisiana, with the exception of a house and lot; and he directs them to transmit the proceeds of the sale to P. Laurans, whom he appointed the executor of his last will. He further declares that this executor is to receive, not only the price of the property sold here, but also the amount of a claim secured by mortgage on a house situated here; and he concludes by ordering that, if, after the payment of all his legacies, there remain a surplus, it shall be rateably distributed among all his legatees according to their respective legacies. It is clear that the testator intended to limit the functions of his Louisiana executors to the selling of his property here, and the sending of the proceeds to P. Laurans, his executor in France, with a view to concentrate all the assets of his estate in the hands of the latter, for the purpose of a single and general distribution among all his legatees. Having property in unequal proportions in both countries, he probably directed this course to be pursued in order to place all the legatees on a footing of equality. If the assets prove insufficient, they will be paid rateably, and if there be a surplus, it will be apportioned among them in conformity with the will. Such appears to have been the under-

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standing of the matter in France, for we see, in the record, that P. Laurans, after having realized the assets of the estate there, made a provisional and rateable distribution of them among the legatees in both countries, and deposited in the *Caisse des Consignations* at Paris, and to the credit of the Louisiana legatees, the dividends accruing to them. This was no doubt done by Laurans as a partial execution of his trust, and in anticipation of the transmission to him of the assets realized in Louisiana according to the will, on the reception of which a further and final distribution among all the legatees was in contemplation. The Judge of the Court of Probates has ordered that the opposing legatees shall be paid, here, the whole amount of their legacies, after deducting the sums placed to their credit in France, on their giving him security that they will refund to the succession whatever sum they may have received over and above their legitimate portion. This decree, we think, is erroneous. It violates a positive behest of the testator, defeats the equality he intended to establish among his legatees, and may give rise to difficulties, which he wished to avoid when he ordered all the funds of his estate to be paid over to P. Laurans, for the purpose of a general distribution of them under his will.

It is, therefore, ordered that the judgment of the Court of Probates be avoided and reversed, as relates to the oppositions of the New Orleans Catholic Association for the relief of Male Orphans, and of the heirs of Clara Rufier, which are hereby dismissed with costs; and that it be affirmed in all other respects. The costs of this appeal to be borne by the appellees.

H. R. Denis, for the appellants.

Canon and Roselius, contra.

Succession of James Cunningham—Peter Cunningham, Appellant.

SUCCESSION OF JAMES CUNNINGHAM—PETER CUNNINGHAM,
Appellant.

Where the heirs are present the succession is not vacant, and no curator can be appointed to it.

APPEAL from the Court of Probates of New Orleans, *Bermudez*, J. Patrick, Thomas, and Peter, brothers of James Cunningham, deceased, and Mary Duffy, his sister, were recognized by the Probate Court as the sole heirs of the deceased, and an order was made to put them in possession of their respective shares of the estate. Peter Cunningham, who had been appointed curator of the vacant succession, presented an account of his administration, praying for its homologation, for his discharge, and for an order to cancel his bond on the payment to the heirs of their shares in the succession. No opposition having been made, the account was homologated on the 30th of April, 1836. In January, 1842, John Wiley presented a petition to the Court of Probates, alleging that he was a creditor of the estate of James Cunningham, the former curator of which was dead, and praying to be appointed curator of the vacant succession. Peter Cunningham opposed this application, and prayed to be appointed himself curator. On the trial of this opposition it was admitted, that the former curator was dead; that Wiley had made a forced surrender under the State insolvent laws, in 1840; and that both Wiley and Peter Cunningham were partners of the deceased in the business of slaters. It was proved that they kept on hand large supplies of slate for the use of those who employed them, and that they occasionally sold slate to others when they had any to spare; but that what they sold was a trifle compared with the stock which they kept for their own use. The judge dismissed both applications, being of opinion that the applicants were commercial partners of the deceased, having unsettled accounts with him, and as such incapable of receiving the appointment of curator; and on the further ground, that a judgment had been rendered acknowledging the heirs of the deceased and ordering them to be put in possession of the estate, and that the whole administration had been clo-

Succession of James Cunningham—Peter Cunningham, Appellant.

sed by the approval and homologation, on the 12th April, 1836, of the accounts of the curator. From this judgment, Peter Cunningham has appealed.

Mitchell, for the appellant. The partnership between the appellant, Wiley, and the deceased, was not a commercial one. *Fouché v. His Creditors*, 7 La. 425. The estate has not been closed nor the heirs put in possession. The record shows that large sums were received, of which no account has been rendered.

Blache, contra. The successions to be administered by curators are those which are *vacant*. Civ. Code, art. 1090. A succession is vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it. Civ. Code, art. 1088. In this case, the succession is no longer a vacant one. The heirs of the deceased are all present, or duly represented; they have been recognized by a judgment of the Court of Probates, and have been put in possession of the estate; and the curator, appointed at the opening of the succession, has rendered his account, which has been homologated. The property which, according to his account, was not then disposed of, has since been sold by virtue of a judgment rendered in an action for a partition between the co-proprietors, and nothing remains to be administered. The judgment appealed from should be affirmed.

BULLARD, J. Peter Cunningham is appellant from a judgment of the Court of Probates, dismissing his application to be appointed curator of the succession of James Cunningham, deceased.

Two reasons are given for refusing to make the appointment. *First*, That the petitioner was the commercial partner of the deceased; and *secondly*, That the estate had already been administered, as a vacant estate, by a curator who had rendered his account, and that the heirs, or some of them, are now present.

The second ground appears to us sufficient. The record shows the fact of a former administration, and that the heirs are present. The estate is, therefore, no longer vacant, and a curator cannot be appointed.

Judgment affirmed.

SUCCESSION OF FELIX DE ARMAS—JOSEPH LE CARPENTIER, Dative Testamentary Executor, Appellant.

The legal mortgage declared by art. 3283 of the Civil Code, to exist on the property of one who without having been appointed tutor or curator to a minor, an interdicted or absent person, interferes in the administration of the property, from the day of the first act of interference, will not attach to the property of one who, having become the surety of a tutor on the condition that he (the surety) should administer the property, received from the tutor, in pursuance of the agreement, money belonging to his wards, which he failed to pay over. The tutor having assented to the employment of the money by his surety, the latter cannot be considered as having interfered with the administration in the meaning of art. 3283.

An executor is entitled to a commission of two and a half per cent on the whole amount of the inventory, after deducting bad debts and unproductive property. The price for which the property comprised in the inventory may sell, is not the standard by which his commissions are to be calculated.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

BULLARD, J. The dative testamentary executor is appellant from a judgment of the Court of Probates, by which the opposition of the tutor *ad hoc* of the minors, Alpuenté, was sustained, and a legal mortgage in their favor recognized upon the property of the succession, and the commission of the executor reduced below the sum claimed by him in his account.

The legal mortgage in favor of the minors, was declared to exist, in consequence of the deceased, De Armas, having intermeddled in the administration of the minors' affairs, in virtue of article 3283 of the Civil Code, which declares such mortgage to exist on the property of persons, who, without having been appointed tutors or curators of minors, interdicted, or absent persons, interfere in the administration of their property, reckoning from the day on which the first act of interference was done.

The facts appear to be, that the deceased, De Armas, became the surety of the tutor of the minors, Alpuenté, upon the condition that he should have and administer the property of the minors; that he received the amount claimed, from the tutor, a few months before his death; that the tutor never provided for the expenses of the minors, who were at a boarding school, under the

Succession of Felix De Armas—Le Carpentier, Executor, Appellant.

care of De Armas. It further appears that the tutor received from Octave de Armas the amount coming to the minors from different successions, and handed it over to the deceased, Felix de Armas; that the tutor received the amount himself, and then placed it in the hands of the deceased, in pursuance of their agreement.

The question is, whether this amounts to an interference in the administration of the minor's property, in the sense of the article of the Code above referred to?

It cannot be doubted that whatever was done by De Armas in relation to the minors, was done with the consent of the tutor, and that the money was confided to him, in order to protect him as surety of the tutor.

A similar question arose in the case of *Nolté & Co. v. Their Creditors*, 8 Mart. N. S. 366. The insolvents were charged with having used a part of the funds belonging to the minors, Harman. It appeared that the estate of the ancestor was under administration by testamentary executors, but it was not shown that the minors were provided with a tutor. The creditors of the insolvents contended that the interference of V. Nolté & Co. was authorized by the executors, or, at least, that they subsequently sanctioned it. But the court said, the evidence did not support either of those allegations, and that there was no proof whatever of authority given by the executors. The case turned upon that question. Now, in the present case, the tutor assented expressly to the employment of the funds by De Armas, and the transaction amounts to little more than a deposit in the hands of De Armas, in the nature of a counter security. It was rather an improper appropriation of the funds by the tutor, than an intermeddling with the minors' property by the deceased. The intention of the legislator appears to us to have been, to protect minors against intermeddlers without any legal authority, and particularly in cases where the minor is without a tutor. It is, perhaps, to be lamented that the law is not broad enough to embrace a case like the present. But it must be remembered that the question here presents itself, in reference to other creditors of De Armas; and, as to them, the legal mortgage cannot be declared to exist except in cases clearly pointed out by law.

The commission allowed by law to executors is two and a half

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per cent on the whole amount of the estimate of the inventory, making a deduction for what is not productive, and for what is due by insolvent debtors. Civ. Code, art. 1676.

The commissions charged are $2\frac{1}{2}$ per cent on the amount of the inventory, independent of notes and of the collections made by the executors (*recouvrements*). The inventory amounted to \$74,509 88, and the commissions charged were upon \$54,580 14, allowance having been made, we presume, for debts not collected; but the court was of opinion that, the estate not being entirely administered, the executor had a right to retain only his commissions on the sums actually received or recovered by him, to the exclusion of promissory notes not yet due, which sums amounted to \$28,082 42. We are of opinion that the court erred. The standard by which the commissions are to be calculated, is the inventory, deducting bad debts and unproductive property, and not the price for which the property comprised in the inventory may sell. In this case the executor has charged his commissions only upon the property, and such sums as he has recovered of the debtors of the deceased.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, so far as it gives to the minors, Alpuenté, the right of a legal mortgage on the estate, and so far as it reduces the commissions of the executor below the amount claimed by him; that, in other respects, the judgment be affirmed; and that the appellees pay the costs of this appeal.

This case was submitted, without argument, by *Benjamin* for the appellant, and *Canon* for the appellee.

ALBERTUS K. AKEN v. ROLPH MARSH and another.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This case was submitted, without argument, by *Bartlette*, for the appellant, and *Maybin* for the defendants.

MORPHY, J. The petitioner claims \$1642 27, being, as he alleges, a balance due him for his services to the defendants as clerk, from the 23d of November, 1835, to the 28th of January,

1840, at the rate of \$1000 per annum. The answer sets forth that in the fall of 1835, the plaintiff, who is the nephew of the defendants, was, at his own request, placed by his father under their care, and in their establishment as coach-makers in this city, for the purpose of assisting in the duties of the establishment, and acquiring a knowledge of the business. That he was to remain with them till he was twenty years of age, and that his compensation for that time was to consist in his being clothed and boarded at their expense; that pursuant to this agreement the plaintiff, who resided in New Jersey with his father, visited this city, and remained with the defendants, with some intervals, until the month of March, 1839, when he became 20 years of age. That after this period, the defendants agreed with the plaintiff to pay him for his services at the rate of \$75 per month while he remained with them, which he did, with the exception of some intervals, till about January, 1840. That while he was under the age of twenty years, the defendants clothed, boarded, and took all possible care of him, and paid his expenses for that time, which far exceeded the amount called for by their agreement, his services not having been worth more than his clothing and board. That the defendants have paid to the petitioner the full amount of what was due to him while in their employ after attaining the age of twenty, at the rate of seventy-five dollars per month, the whole amount paid to or for him being \$2210 24. There was a judgment below for the defendants, from which the plaintiff has appealed.

Our attention has been called to a bill of exceptions to the opinion of the judge below, who admitted in evidence a paper purporting to be an open letter, or proposition of the plaintiff to his father, stating the terms or expectations under which he wished to go into the employ of the defendants, and craving his written consent thereto at the foot of the paper, which appears to have been afterwards signed by the plaintiff, by John Aken his father, and by Rolph Marsh, one of the defendants. The objections taken were, that it was not an agreement with Rolph Marsh & Co., Rolph Marsh being a party thereto in his individual capacity; and that there was an erasure and interlineation in an important part of the instrument. The paper was, in our opinion, properly received. It treats of the business of the defendants, and not of

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that of Rolph Marsh alone. The plaintiff speaks in it of his uncles John and Rolph, and of his coming to New Orleans in their employ. One of the partners was surely competent to sign such an agreement for the firm. As to the interlineations, they appear to be in the hand-writing of the plaintiff himself, and, moreover, are not in our opinion very material.

On the merits, we have examined the evidence adduced by both parties, and, upon the whole, agree in opinion with the judge *a quo*, that the defendants have made out the defence set up in their answer.

Judgment affirmed.

THE STATE V. THE JUDGE OF THE COURT OF PROBATES OF NEW ORLEANS.

A person cannot be received, in his private capacity, as surety on an appeal from a judgment against him as the executor or curator of a succession, though the succession itself be solvent.

Where security is required to be given by order of court, the person offered must be a resident of the State.

Case of *Gravillon v. Richard's Executor et al.*, 13 La. 293, overruled, so far as the dictum that "as soon as the will of making a permanent establishment in the country is combined with the fact of residence, the residence, even for a few days, fixes the domicile," applies to the acquisition of a residence in this State.

An uninterrupted residence of one year within the State, is necessary, under the acts of 7th March, 1816, and 16th March, 1818, to acquire a domicile in this State; and until then, a party may be sued by attachment as a non-resident. It is not necessary that he should have remained the whole time within the State, provided that, during any temporary absence, he retained an office or room as his residence, and left some authorized agent to represent him.

APPLICATION for a mandamus to the Judge of the Court of Probates of New Orleans, *Bermudez, J.*

This case was submitted, without argument, by *C. M. Jones*, for the applicant.

GARLAND, J. Barnes instituted a suit in the Probate Court against Thomas O. Tilghman, curator of the estate of Hardin L.

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Tilghman, in which Kirk intervened, and a judgment was rendered against the defendant for \$1746 87 in favor of the intervenor. The curator, conceiving the judgment erroneous, made his application for a suspensive appeal, which was allowed, and a bond given in a sufficient sum, signed by Thomas O. Tilghman as curator, and by the same person as surety, and also by Robert L. Tilghman. Before the record was made out, the plaintiff objected to the security, and took a rule on the curator to show cause why the appeal should not be set aside, on the grounds :

First. That Thomas O. Tilghman could not be a security on the bond, being the curator, and also one of the heirs of the estate.

Second. That Robert L. Tilghman was insufficient as security, not being a resident of the State, not having sufficient property to become security for the sum required, and being also an heir to the estate.

The Judge of the Court of Probates, after hearing evidence, made the rule absolute, and the defendant and appellant now applies to us for a mandamus, to compel the judge to send up the appeal. The latter shows for cause, the grounds already stated as the basis of the rule ; and further, " that the law has provided for this case another relief than that applied for, and other prerequisite formalities than those that seem to have been fulfilled in the present case."

The Judge of Probates was right in deciding that Thomas O. Tilghman could not be a security on the bond signed by himself as curator, although the succession may be solvent. The case of *Lafon v. Lafon's Executors*, 2 Mart. N. S. 571, is clear as to that point. The court then said that executors cannot be received, in their private capacities, as sureties on an appeal from a judgment given against them in their representative character.

The objections to Robert L. Tilghman are three :

First. That he is not a resident of the State. *Second.* That his title to the property he possesses is doubtful. *Third.* That he is one of the heirs of H. L. Tilghman's estate.

• The facts in relation to the first objection are, that R. L. Tilghman came to New Orleans early in the year 1839, with the intention, as he says, of residing here. He is the owner of several

slaves, carts, and drays. He pays taxes, and has voted in the Second Municipality. He states that it has always been his intention to reside in this city, and a witness says that he is a resident; but it appears that he has never remained one year, without interruption, in the State. It has been his habit every summer, about the last of June, to leave the city, and visit his mother and relatives in Tennessee, where he remains until about the 1st of October, or later if the sickly season be not over. He leaves his property here, and when he first came he brought three slaves with him. But it is not shown that when he departs he leaves a house, office, or room in the city, which can be considered as his residence or domicil, where a citation or notice can be left or legally served, and an authorized agent to represent him. If that were shown, it might be a sufficient compliance with the law.

There is no doubt that when a person is bound to give a surety under an order of court, that he must give a person residing in the State. 1 Mart. N. S. 276. The question then is, where is the domicil of R. L. Tilghman? The Civil Code, articles 44, 45, says, that where there is no express declaration as to domicil, the proof of intention depends upon circumstances. This court in *Gravillon v. Richard's Executor et al.*, 13 La. 297, said, "as soon as the will of making a permanent establishment in the country is combined with the fact of his residence, the residence, even for a few days, fixes the domicil." This was, perhaps, pressing the principle of domicil too far. The subject was again considered in 14 La. 169, when it was held that it requires an uninterrupted residence of one year in one of the parishes in the State, to acquire a domicil, and, until then, a party may be sued by attachment, as against a non-resident. The provisions of the acts of the legislature passed in 1816 and 1818 are plain. The first section of the latter act says, that there must be a residence of "one year without interruption" in one of the parishes of the State, the party having, in the meantime, purchased or rented a house or room, or parcel of land, or pursued some profession or employment for a support. Bullard & Curry's Dig. 286, 287, sec. 1, 2. The letter of the law is too clear to be misunderstood; and it seems to have been made, to operate on that description of persons who come to our State for purposes of their own, and never identify

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themselves with our interests and institutions. We are, therefore, of opinion that the judge did not err, in deciding that Robert L. Tilghman was not a resident of the State, and could not be accepted as security on the appeal bond.

Our opinion on this point, makes it unnecessary to decide on the other two objections to Robert L. Tilghman.

SAME CASE—APPLICATION FOR A RE-HEARING.

Where the security, given within the ten days to obtain a suspensive appeal, and accepted by the judge, is afterwards rejected, the appeal should not be dismissed without allowing the party time to procure other security.

C. M. Jones, for the curator, for a re-hearing, urged that the court had misconstrued the decision in *Lafon v. Lafon's Executors*. The original judgment, from which an appeal was sought in that case, had been rendered against the executors *personally*, and the court correctly held that they could not be sureties on the appeal bond. Had the judgment been against the estate, they would have been sufficient. Tilghman lost his residence in the State from which he moved, as soon as he left it with the intention of fixing himself in this State. The decision of this court, declaring that he could not acquire a residence within this State before the expiration of twelve months, will have the effect to disfranchise him, for a time, of the privileges and immunities of citizenship.

GARLAND, J. Upon further consideration of this cause, on the application for a re-hearing, the court is of opinion that some relief should be extended to the petitioner. He gave a bond and security within the ten days to obtain a suspensive appeal, which was accepted by the judge, and afterwards the security was rejected. The judge should have permitted the party to give other security on the bond, and not have dismissed the appeal entirely.

It is, therefore, ordered and decreed, that a mandamus issue commanding the judge of the Court of Probates to send up the appeal heretofore granted by him, if the appellant shall give

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good and sufficient security on the bond filed, within five days after the recording of this judgment in the said Court of Probates.

MARIE ANTOINETTE SMITH v. AMABLE SÉNÉCAL and another.

No action will lie against a partnership, for money lent to one of the partners in his own name, to be put by him into the partnership as his share of the capital, and to be repaid to the lender out of his portion of the profits of the business. The right of action exists only against the borrower, and not against the partnership, with which the lender never contracted.

No action can be maintained by a partner against the firm, to withdraw his portion of the capital, before the expiration of the term for which the partnership was to exist. Partnership funds must be applied to the payment of the partnership debts, in preference to debts due by a partner individually.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The petitioner seeks to recover of the defendants \$10,000 paid to Sénécal on or before the 31st of December, 1836, as a portion of the capital stock that John Cauchois, her son-in-law, was to put into the co-partnership of Sénécal & Cauchois. She alleges that the firm engaged to refund to her this amount, by yearly instalments of one thousand dollars. That they have not only paid no part of the said sum according to contract, but that, for the purpose of defrauding her of the ten thousand dollars, Sénécal & Cauchois have sold out the largest portion of their goods and merchandize, and are selling off the rest, and are about leaving the State, with the fraudulent view of depriving her of all recourse against their property and persons, before she can obtain and execute a judgment against them in the ordinary course of judicial proceedings. The petition concludes with a prayer for a writ of attachment against the property of the firm, and an order of arrest against Sénécal, the only partner residing here. The answer pleads the general issue, and avers that Michel Musson who signed the articles of co-partnership, as attorney in fact for J. Cauchois, then in France, was without authority to insert in it the

clause by which one thousand dollars are to be paid each year to the plaintiff, and that, as soon as J. Cauchois was apprized of the said clause in the act of partnership, he wrote to Sénécal that he would not ratify it. The answer denies that the defendants ever intended to defraud the plaintiff, and avers that they were selling out in the usual way of their business where European goods have long been in store. It concludes with a reconventional demand for the sum of \$25,000 as damages, for the injury done to the defendants by the calumnies set forth in the petition, and the wrongful suing out of an attachment which has rendered it impossible for them to meet their engagements and transact their business. The case was submitted to a jury on the main action only, the court below having, on motion, ordered the reconventional demand to be stricken out of the answer, as irregular, illegal, and premature.

There was a verdict and judgment below for the defendants, from which the plaintiff has appealed.

The co-partnership between Sénécal & Cauchois, to form which the plaintiff agreed to advance, and did advance the sum of \$10,000 for Cauchois, her son-in-law, was to begin on the 1st of May, 1836, and to expire on the 1st of October, 1839. The articles of co-partnership are signed only by Sénécal, and Musson as attorney in fact of Cauchois; and the clause upon which the plaintiff rests her claim for reimbursement against the firm, is in the following words, to wit:

"A. Sénécal et John Cauchois percevront chacun annuellement une *allowance* de seize cents piastres pour leur entretien particulier. Sur sa portion John Cauchois s'engage à appliquer une somme de mille piastres par an à l'extinction de la dette de dix mille piastres, sans intérêts, qu'il a contractée envers sa belle mère, Madame Vve, Ml. Smith, et à cette fin au lieu de toucher les dites mille piastres, le versement en sera fait par la société entre les mains de Monsieur Michel Musson aux époques convenues contre son reçu, pour compte de Madame Vve, Ml. Smith, dont il est l'agent en cette ville."

Canon, for the appellant.

A. Hennen, for the defendants. The plaintiff loaned her son-in-law, Cauchois, one of the defendants, \$10,000, to be placed in the commercial co-partnership of Sénécal & Cauchois, which sum

was to be refunded, without interest, in ten annual payments to be deducted out of the amount to be withdrawn by Cauchois, for his private expenses, from the co-partnership, which was to expire at the end of three years; consequently, the last seven payments were to be made after its expiration. The plaintiff has sued for the whole amount of the loan made to Cauchois, claiming payment out of the partnership funds. She has mistaken her action. The loan was made to *Cauchois only*, and not to the co-partnership of Sénécal & Cauchois. To Cauchois only can she look for repayment. The Emperors, Diocletian and Maximian, state succinctly the true principles on which the case should be decided: "Eum, cui mutuam dedisti pecuniam, ad solutionem urgere competente debes actione. Nam adversus negotiatores, quos ex mercibus pecunias abstulisse tuo debitore proponis, nullam habes actionem. Code, lib. 4, tit. 10, l. 13. The comment of Godfrey, is equally clear (No. 35): "Negotiatores, id est, mercatores, ad quos pecunia propter mercimonia pervenit." The same emperors again state the same principle: "Non adversus te creditores, qui mutuam sumisti pecuniam, sed ejus, cui hanc credideras, heredes experiri, contra juris formam evidenter postulas." Code, lib. 4, tit. 34, l. 8. Modestinus coincides with them. Dig., lib. 12, tit. 8, l. 49. "His solis pecunia condicatur, quibus quoque modo soluta est, non quibus proficit." These fundamental principles of natural justice are fully recognized by modern nations. See Story on Partnership, p. 211, secs. 134, 135. Pothier, Contrat de Société, Nos. 101, 105, 106.

Again, Sénécal, the co-partner of Cauchois, who borrowed the money from the plaintiff, his mother-in-law, to put it into the co-partnership of Sénécal & Cauchois, has the right to insist on the application of the co-partnership funds, to pay the debts of the co-partnership, in preference to all debts due by Cauchois. The plaintiff, therefore, has no right of action, until after a liquidation and settlement of the partnership debts. She can have no greater right, than if she had obtained judgment separately against Cauchois, (which was her only course,) and was now endeavoring to enforce her judgment on his interest in the partnership effects. 1 Story's Equity Jurisprudence, 625, secs. 675, 677. Story on

Partnership, 135, sec. 97. Ib. 470, sec. 326. 3 Kent's Commentaries, 59.

MORPHY, J. In the clause on which the plaintiff rests her claim for reimbursement against the firm, even taking for granted the right of Cauchois' agent to make it, we cannot see any engagement on the part of the firm to become indebted for, or to repay to the plaintiff, the capital advanced by her to her son-in-law, and by him put into the partnership. If, in virtue of this clause, the petitioner, under proper pleadings, had claimed the one thousand dollars a year, which were to be retained by the firm and paid over to her, out of the allowance of \$1600 made to Cauchois for his private expenses during the existence of the partnership, she might and probably would have recovered. The partnership would have had to pay the money to her, not as a reimbursement or restitution of the capital paid in by Cauchois, but as a part of the sum which the latter had the right to draw for his expenses each year, and which, by agreement, was to be paid to her. But, in this suit, the petitioner claims of the defendants the very capital which she has advanced to Cauchois to form the partnership. This she has clearly no right to do; she lent her money to Cauchois, not to the partnership. It is, therefore, against Cauchois that her right of action exists, and not against the firm, with whom she never contracted. Story on Partnership, p. 211, § 134, 135. Pothier, No. 101, 105, 106. But there is another view of this subject equally fatal to the plaintiff's pretensions. Her suit is, in substance, to withdraw Cauchois' share or portion of the capital of the partnership, before the time for which it was contracted has expired, for this action was brought on the 20th of November, 1838. This Cauchois himself could not do, nor can the plaintiff. 10 Mart. 433. 7 Ib. N. S. 284. 8 Ib. N. S. 281. Sénécal has clearly the right to insist on the application of the partnership funds to the payment of the partnership debts, in preference to all debts due by Cauchois individually. The plaintiff's only remedy was to sue Cauchois, against whom alone she has a right of action, and to attach such balance as might be coming to him upon a final settlement of the partnership. Civ. Code, art. 2794. Story on Partnership, p. 135, § 971.

Judgment affirmed.

JEAN BAPTISTE DUPEYRE v. THE WESTERN MARINE AND FIRE
INSURANCE COMPANY.

Seaworthiness is an implied warranty in every contract of insurance. It is a condition precedent, without which the liability of the insurers cannot exist, although the unseaworthiness may result from some vice or defect unknown to the insured.

Where a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness; and it is incumbent on the underwriters to show that this warranty has not been complied with. But where a loss occurs, which cannot be ascribed to stress of weather, or accident, the presumption will be that the vessel was not seaworthy; and the burden of proof must be on the insured.

A policy of insurance protects against extraordinary accidents and perils; but cannot be considered as securing indemnity for natural decay and ordinary wear and tear.

The party insured will be responsible for any loss, occasioned by want of proper care on the part of his agents.

Although, generally, the warranty of seaworthiness refers to the commencement of the risk, the fact of being seaworthy then, does not satisfy the warranty. The vessel must be kept in a seaworthy condition, or restored to it in the successive stages of the voyage, so far as it depends on the insured or his agents.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. This action is brought to recover \$8000, on a policy of insurance on the steamboat *St. Léon*. The insurance was for six months from the date of the policy, and the loss happened on the day before the expiration of that time. The defence set up by the underwriters is, that during the existence of the policy, and at the time of the loss, the *St. Léon* was unseaworthy, and that she was not lost by a peril insured against. The case was tried by the court below, without the intervention of a jury. There being a judgment for the plaintiff, the defendants have appealed.

By the policy, which is in the usual form, the *St. Léon* was to run as a ferry boat between this city and the opposite side of the river, with liberty to tow vessels up and down the river to the distance of about fifty miles, and to run to the mouth of the Mississippi river, and about one hundred miles up the river above New Orleans. The adventures and perils insured against by this policy are of the sea, river, and fire, and all that have or shall come

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to the hurt, detriment, or damage of the said steamboat, engine, or any part thereof. The account given by the witnesses of the loss of this boat, agrees with plaintiff's own showing in his petition. It appears that on the 12th of September, 1839, the boat had proceeded to La Croix' plantation, about three leagues down the coast, to bring up some sick person. That about three o'clock P. M. of the same day, she returned, landed her passengers on the other side of the river, and was then brought to, and properly secured at the usual ferry landing place. The evening was a fine and calm one. At the usual hour the hands went to rest, with the exception of one Nadal, who had the watch. Nothing occurred until half past nine o'clock, when the latter discovered that the boat had sprung a leak, and was filling very rapidly. He immediately gave the alarm, and, notwithstanding all possible exertions on the part of the master and hands, who immediately assembled, the boat sunk shortly after. The petition does not allege, nor does the evidence show any stress of weather before, or at the time of the loss of the boat, nor any accident or circumstance arising from the perils insured against, which could immediately or remotely have occasioned such loss.

Seaworthiness is an implied warranty in every contract of insurance. It is a condition precedent without which the liability of of the insurers cannot exist, although the unseaworthiness may arise from some inherent vice or latent defect unknown to the assured. When a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness, and it is incumbent upon the underwriters to show that this warranty has not been complied with ; but when, as in the present case, a loss occurs which cannot be ascribed to stress of weather, or to any accident which might by possibility have produced it, the fair and natural presumption is, that the vessel was defective and not seaworthy, and the burden of proving that, in fact, she was seaworthy is then thrown on the insured. 1 Philips on Insurance, 308, 324. 1st Condy's Marshall, 158. The whole evidence adduced by both parties on this head, when taken together, rather strengthens than destroys the presumption of law arising from the circumstances of the loss in this case. The witnesses for the defendants, some of whom are inspectors of Insurance Companies,

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shipbuilders, &c., have declared that, upon a thorough examination of the *St. Léon*, when she was hauled out of the water and placed on the ways, she was found to be absolutely rotten and unsound in her most essential parts. That her plank and timbers were so decayed that they came to pieces. That she was unfit for repairs, and, in their opinion, could not have been seaworthy at the time she sunk, nor for several months before. That she had been built with common western oak some time in 1833, and that boats constructed with this wood seldom last six years. That they rot on the Mississippi sometimes in about three years, sometimes in less time. This testimony is partially confirmed by some of plaintiff's witnesses, while it is contradicted by the others, who testify that the *St. Léon* was not absolutely unsound. That she was in every respect fit to act as a ferry boat in the river. That she had been remarkably well built, and had been repaired eighteen months before she sunk. That the plaintiff was extremely careful and attentive in making the necessary repairs to his boats, &c. With the evidence before us, and in the absence of any apparent cause arising from the perils insured against, the loss can hardly be ascribed to any other cause than the general rottenness of the boat, the usual wear and decay gradually rendering her unfit for the uses to which she had been put. A policy of insurance is a protection against extraordinary accidents and perils, but never was nor can be understood to secure an indemnity for natural decay and ordinary wear and tear. 1 Phillips, 625—627. 8 Peters, 583—585. But it is said that there are different degrees of seaworthiness. That a vessel which may not be considered sufficiently staunch for the stormy and hazardous navigation of the ocean, may with safety navigate a river; and that this boat is represented by some of the witnesses as fit for the employment she was in. Admitting that, by reason of the light duties she had to perform as a ferry boat, we could consider her as strictly seaworthy in relation to her general condition, there is a circumstance which has not been much relied on in argument, but which, alone, would be sufficient to prevent the plaintiff from recovering.

All the witnesses speak of a hole which they saw in the bottom of the boat, when she was hauled out of the water. This hole, they say, was made to insert the pipe of the cold water pump,

which all steamboats are obliged to have, to supply their boilers with water. The plug to stop the hole was not in it. If not properly secured, this plug is apt to drop out, or be displaced. If such a thing happens, a boat may sink in twenty minutes according to one witness, or in two hours according to others. Ames, one of the plaintiff's witnesses and his engineer, says that he had attached to the boat her cold water pump some three years before she sunk. That five or six days before the loss, finding that she leaked considerably at the plug, and fearing she might sink from it, he took it out and fixed it, and took the pipe to the coppersmith to have it mended. That he supposes it was not over three quarters of an hour after the alarm was given, that the boat sunk. The evidence renders it extremely probable, and such appears to have been the opinion of the plaintiff himself, that the loss happened in consequence of the plug getting out of the hole. It is not pretended or proved that the plug was displaced by any accident arising from the perils insured against. It could not have dropped out during the trip performed in the course of the day, because the witnesses say it would have sunk her in less than an hour. It must have happened long after the boat was moored in still water and calm weather to the bank of the river. The plug must have been insufficiently secured. The loss, then, was owing to the want of proper care on the part of the agents of the assured, and he must be responsible for their acts. 1 Philips, 589, *et seq.* 13 L. 524. If it be true, moreover, that all steamboats must at all times be provided with this cold water pump to supply their boilers with water, the *St. Léon* cannot be considered to have been in a state of seaworthiness at the time of the loss, as she was without this pump, which is said to be necessary for the safe and secure navigation of boats propelled by steam. If, instead of a plug carelessly screwed, the *St. Léon* had had a water pump, the water would have risen in the pipe to the level of the river, and there could have been no danger or accident on that score. Although, in general, the warranty of seaworthiness refers to the commencement of the risk, the mere fact of a vessel being then seaworthy does not satisfy the warranty. She must be kept in a seaworthy condition, or restored to it in the successive stages of the voyage, as far as depends on the insured or his agents.

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1 Philips, 325. This of itself might be considered as a breach of the warranty of seaworthiness, sufficient to avoid the policy.

It is, therefore, ordered that the judgment of the District Court be reversed, and that ours be for the defendants, with costs in both courts.

Canon, for the plaintiff.

Maybin, for the appellants.

NOEL BARTHELEMY LE BRETON, Curator, v. JOHN McDONOUGH.

Where one who sells a certain quantity of land, afterwards fixes the boundaries himself, the purchaser will take all the land between the boundaries. C. C. 850.

A tenant cannot dispute the title of his lessor, nor change his possession by setting up other titles. The possession of the lessee is that of the lessor.

APPEAL from the District Court of the First District, *Buchanan*, J.

L. Janin, for the appellant.

Grymes, contra.

GARLAND, J. The petition states that the late Jean Gravier was the owner of a piece of land in the city of New Orleans, being part of square, No. 15, included between St. Marc, Magdeleine, Perdido, and Poydras streets, having a front on Magdeleine street of 365 feet 5 inches, and a depth of 69 feet 3 inches, which has never been alienated, and belongs to the succession of said Gravier. To this property it is alleged that the defendant sets up a claim, and thereby slanders the title of Gravier. It is, therefore, prayed, that McDonough be compelled to produce his title; that it be declared null and void; and that he be compelled to desist from setting up any further claim, and to pay damages.

The defendant denies the plaintiff had either possession or title; sets up title in himself; and pleads the prescription of ten years.

It was shown that the ground in controversy formed a portion of the tract of land which formerly belonged to Jean Gravier. On the part of the defendant it was established that, in 1820, Jean Gravier mortgaged to J. W. Oddie a piece of ground, having 400 feet front on Perdue and Girond streets, running back 900 feet be-

tween Canal and Pigconnier, now Perdido, and Poydras streets. In 1821 this property was sold by the sheriff under an order of seizure and sale, and purchased by Casteres on twelve months' credit. Casteres not paying the bond given for the price, it was sold to Abat in 1824, who, in March 1827, by notarial act, sold to the defendant. On the 27th of November, 1827, Jean Gravier leased from the defendant four squares of ground, Nos. 27, 23, 19, and 15, bounded by Poydras, Magdeleine, Perdido and Girond streets, for four years, and occupied the premises. The square, No. 15, covers the ground in dispute. This lease, as well as some parol testimony, shows that previous to 1827 Gravier had made a plan of some portion of his land, surrounding that sold under the mortgage to Oddie, laying it out into squares, and running the streets so as to pass through the defendant's property, but whether with his consent or not, is not shown, as this plan is not produced. In 1831, about the time the lease expired, the defendant made a plan of the property, which represents it as now claimed by him. Whether Gravier ever assented to this plan is not shown, but he never disturbed the defendant's title during his life; and his plan, made previous to 1827, from the description of the squares contained in the lease, must have been similar to that made by the defendant. From Girond to Magdeleine street is about 968 feet, including the width of the intervening streets; excluding them, it is 829 feet, all French measure.

The District Judge gave a judgment for the defendant, and the plaintiff has appealed.

When the piece of ground was first mortgaged and sold, it was not divided into squares; this was done afterwards; and as Gravier was proprietor of the surrounding property, it was important to him that the streets should continue through it. The vendor of the defendant was not bound to permit this without compensation. It may, therefore, be well supposed that Gravier was disposed to make him some remuneration, although the fact is not proved further than his acts show it. But it is to be presumed that Gravier knew the premises well, as he had been the owner of them, and had caused a plan or survey of them to be made. He leased with reference to this plan. The boundaries were fixed. He admitted the possession of the defendant to that

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extent, and never denied that his vendor held to the same limits. In this lease Gravier says, that he leases the *entire* square bounded by Magdeleine, Poydras and Perdido streets. The intention of possessing by these limits is, therefore, expressed, and its justice admitted. Civ. Code, art. 3400. If one sells a piece of land from one fixed boundary to another, the purchaser takes all the land between those boundaries. Civ. Code, art. 850. This article of the Code is substantially fulfilled, if a person sells a certain quantity of land, and afterwards fixes the boundaries himself. It is very strong evidence to show that the parties so intended, particularly when a lease of the land is taken designating those boundaries. This court have held that a tenant cannot dispute the title of his lessor, nor change his possession by setting up other titles. The possession of the lessee is that of the lessor, and binds both parties. 10 La. 360:

We think the District Judge did not err in considering the lease as an acknowledgment, on the part of Gravier, that the possession of the defendant, under his title, extended to Magdeleine street; and this being the case, he, and those under whom he claims, have held under titles translativ of property, and by boundaries admitted by the former claimant. We are, therefore, of opinion that the plea of prescription must prevail.

Judgment affirmed.

HENRY ANDERSON and another v. PETER CUNNINGHAM.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. This action was instituted to recover a balance due on a note and open account, of \$212 33. The defendant, in his answer, sets up a demand in reconvention of \$4000, alleging various errors in the account, and over-charges of interest and commissions. The plaintiffs had a judgment for \$81 80, with interest, from which the defendant has appealed.

The record shows that the inferior judge greatly reduced the

demand of the plaintiffs, but what items were found objectionable he does not inform us ; nor does the testimony, which is very meagre, furnish us any clue. The counsel for the plaintiffs says that the reduction was caused by the rejection of the items of interest and commissions, which were considered illegal. This is very probably correct, as those items amount to about the sum by which the account has been reduced. This part of the case may, therefore, be dismissed, without further remark.

But the defendant alleges that there is an error in the account which is palpable, and which, when corrected, will leave a large balance in his favor. There is no doubt of the correctness of the assertion of the defendant. It appears from the account that, on the 25th of September, 1839, the defendant endorsed and delivered to the plaintiffs, Dakin & Dakin's note for \$519 12, due on the 23d of October following. The plaintiffs gave the defendant credit for the amount of the note, when they received it. The note was protested at maturity, when the plaintiffs charged the defendant with the amount and the costs of protest. They then brought suit in their own names against Dakin & Dakin, and Baggett their endorser, recovered a judgment, and issued an execution, which, on the 11th of January, 1840, was returned satisfied by the sheriff ; yet they do not give the defendant any credit for the amount so recovered. Whether they have received the money from the sheriff, does not appear. If they have not, the defendant is not to lose it. This error, being corrected, will leave a balance in favor of the defendant. The amount recovered of Dakin & Dakin was \$529 62, deducting from which the amount allowed the plaintiffs by the judgment appealed from, \$81 80, and a balance will be due from them to the defendant of \$447 82, for which he is entitled to a judgment.

The other errors complained of are not apparent, and the evidence not having made them so, we cannot apply any corrective.

The judgment of the Commercial Court is therefore annulled ; and it is further adjudged and decreed, that Peter Cunningham, on his demand in reconvention, do recover of H. and W. Anderson, the sum of four hundred and forty-seven dollars and eighty-two cents, with interest thereon at the rate of five per cent

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per annum, from the 7th day of December, 1840, until paid, with costs in both courts.

L. C. Duncan, for the plaintiffs.

J. Mitchell, for the appellant.

SAME CASE—ON A RE-HEARING.

GARLAND, J. Upon the application of the plaintiffs for a re-hearing, we have re-considered our opinion. There is a credit of \$500 given to the defendant in the account of the plaintiffs, which they allege to be the proceeds of the note of Dakin & Dakin, collected by them, and it is rendered probable by a re-examination of the testimony. The credit is at a date different from that when the sheriff returned the execution; the sum is not the same, nor is it stated to be the money recovered from Dakin & Dakin; but the plaintiffs say it is the same, deducting the expenses of recovery.

During the argument, the counsel for the defendant contended there were serious errors in the accounts between the parties, other than that considered by us. His pleadings show the assertion of these claims, but the evidence not making them clear they were not examined.

Under all the circumstances, we think the justice of the case will be best attained by setting aside the final judgment rendered by us, and remanding the case for a new trial, when each party will have an opportunity of more fully explaining their respective claims.

It is, therefore, ordered, that the judgment heretofore rendered herein be set aside and annulled; and it is further ordered and adjudged, that the judgment appealed from be annulled and reversed, and the cause remanded for a new trial, to be proceeded in according to law; the plaintiffs paying the costs of this appeal.

DANIEL TREADWELL WALDEN v. ROBERT FINLEY CANFIELD and others.

A purchaser who shows a judgment, execution, and sale under which he holds, has a title sufficient to acquire by the prescription of ten and twenty years; and no informalities in the sale can affect his title, where he has possessed under it the time required by law to acquire the property by prescription, before such informalities were set up.

The date of the election or resignation of a Senator of the United States, of the appointment of a member of the President's Cabinet, or of a Foreign Minister, are matters of historical notoriety, which the court will notice though not proved in the record.

One who left the State to discharge the duties of a Senator of the United States, and who, on resigning, was made a member of the President's Cabinet, and subsequently a Foreign Minister, will not be considered as having lost his domicile in this State, where no act has been done evincing any intention to acquire a new domicile (C. C. 46); and prescription will run against him as if actually within the State.

APPEAL from the District Court of the First District, *Buchanan, J.*

F. B. Conrad, and Hoffman, for the appellant.

Roselius and G. Strawbridge, for the defendants.

SIMON, J. The plaintiff sets up title to the property in dispute under a sheriff's deed, from which it appears that on the 11th of November, 1837, he became the purchaser at a sheriff's sale of the right, title, and interest of the heirs of Edward Livingston in and to the premises in controversy, and in some other property. The sale was made by virtue of a *pluries fi. fa.*, issued at the suit of Mitchell and Lemoyne against Edward Livingston, for the price of seventeen hundred dollars cash.

The defendants, who are in possession of the premises, and have been so, by themselves and their warrantors, since the month of January, 1827, claim under a title derived from the marshal of the United States for the Eastern District of Louisiana, by whom the property was sold to their author by virtue of a *venditioni exponas* directed to him by the District Court of the United States for the Southern District of New York, at the suit of the United States of America against Edward Livingston.

The defendants having called their authors in warranty, issue was regularly joined by them successively, and after a full investigation of the respective rights of the parties, the District Court

rendered judgment in favor of the defendants; from which, the plaintiff has appealed.

Several points were raised in the argument of this cause, as growing out of the pleadings and of the evidence adduced by the parties, one of which, the plea of prescription, we have only deemed it necessary to examine. The defendants' author, Jacob R. Wolf, relies mainly on the prescription of ten years.

On this point, the evidence shows that the property in dispute was adjudicated by the marshal of the United States to John W. Smith, on the 11th of January, 1827, and that the defendants, and their authors, have been in possession of it ever since. We find it admitted in the record that a judgment was regularly rendered against Edward Livingston in the District Court of the United States for the Southern District of New York, at the suit of the United States. That a writ of *venditioni exponas* was regularly issued under said judgment, directed to the United States marshal for the Eastern District of Louisiana. That in virtue of said writ the marshal advertised and sold the property in dispute in this suit, in the manner stated in his return. That at the sale John W. Smith, the special agent of the United States, became the purchaser for and on account of the United States. That Smith had full authority from the Treasury Department of the United States to purchase the property; and that Smith afterwards sold the property, under authority to that effect, to Jacob R. Wolf, the last warrantor in this case. It is also admitted, in another part of the record, that Edward Livingston left the State of Louisiana in 1827 or 1828; that he never returned; and that between the date of his departure from Louisiana, and his death, he was successively Senator in Congress, Secretary of State, and Ambassador to France. It is further shown by the probate proceedings relative to the will of Edward Livingston, that he died in the month of May, 1836, in the State of New York, and that after his death, his widow and daughter returned to Louisiana, where they seem to have become residents. The will of the deceased was admitted to probate in the Court of Probates for the parish of New Orleans, his widow was recognized as his sole executrix, and letters testamentary were ordered to be delivered to her according to law, on the 2d of January, 1837.

The prescription under consideration is established by article 3442 of the Civil Code, in these words: "He who acquires an immoveable in good faith and by a just title, prescribes for it in ten years if the real owner reside in the State, and after twenty years if the owner resides out of the State." And according to article 3445, in order to acquire the property of immoveables by this species of prescription, four conditions must concur: 1, good faith on the part of the possessor; 2, a title which shall be legal, and sufficient to transfer the property; 3, possession during the time required by law; and 4, an object which may be acquired by prescription. Now, it is not pretended that the defendants' author was in bad faith; and, as good faith is always presumed in matters of prescription (Civ. Code, art. 3447); and as the thing in dispute, which is the object of the prescription, is susceptible of alienation, and is not one of those of which the alienation is prohibited by law, (art. 3463,) we shall proceed to examine:

First. The nature of the title set up by the defendants.

Second. Whether the time of possession necessary to acquire the prescription contended for, was sufficiently completed before the institution of this suit.

I. To be able to acquire by the prescription of ten and twenty years, (Civ. Code, art. 3449,) a legal and transferable title of ownership is necessary in the possessor; this is what is called in law *a just title*; and a just title, according to the definition given in arts. 3450 and 3451 of our Code, is one which, by its nature, would be sufficient in itself to transfer the property. In this case, the defendants have produced a regular judgment, writ of execution, and a deed of sale from the marshal to their author; and, under the well-settled and repeatedly established doctrine of our jurisprudence, that in relation to sales under execution, where a purchaser shows a judgment, writ of execution, and sale under which he holds, his title will be considered as legal and valid, (3 La. 476. 5 Ibid. 486. 9 Ibid. 542. 16 Ibid. 454, 547. 18 Ibid. 530. 19 Ibid. 309,) we think that, on this point, the defendants have satisfactorily complied with the requisites of the law; and that, their title being a just one, that is to say, one which of itself was sufficient to transfer the property in dispute, it is such as can legally serve as the basis of the prescription under consideration.

It is true that the plaintiff has attempted to attack the defendants' original sale, on the ground of informality in the other proceedings of the marshal ; but this, in our opinion, cannot change, or in any way alter the effect of the defendants' title, if they have really possessed under it, during the time required by law to acquire the property by prescription, before the institution of this suit, or in other words, before the alleged informalities were set up against the presumed legality and validity of their title. As it was sufficient to acquire and transfer the property, it must be sufficient to enable the possessor to prescribe under it.

II. The sale by the marshal took place on the 11th of January, 1827, and it is admitted that Edward Livingston left the State in 1828, and became successively Senator in Congress, Secretary of State, and Ambassador to France. The present suit was brought on the 11th of April, 1839, so that the defendants have shown a continued and uninterrupted possession of the property during twelve years and three months. But it has been urged that Edward Livingston was absent from the State since 1828 ; that he never returned ; and that in order to determine the time necessary to acquire the prescription contended for, (the prescription of ten years,) the time of his absence can only benefit the defendants for one-half thereof. The admission of the parties does not exactly fix the epoch of Edward Livingston's departure from Louisiana, nor the period during which he successively occupied his different offices ; but it is one of those matters of public notoriety, one of those facts which belong to the history of the country, which we feel bound to notice, that E. Livingston was elected to represent Louisiana in the United States Senate on the 12th of January, 1829 ; that he resigned in the spring of 1831 ; that he was then made Secretary of State by President Jackson ; and that he went as Minister to France in 1833. The question then occurs, could he be considered as an absentee from Louisiana during the time that he occupied those offices ; or, in other words, did he lose the legal domicile he had in Louisiana to acquire one elsewhere ? It is to be remarked that the origin of his absence proceeded from his having been elected to represent this State in the United States Senate. Now, art. 46 of the Civil Code says : " A citizen accepting a temporary and precarious office, or one

from which he may be removed at pleasure, retains his ancient domicile, if he has not evinced a contrary intention." This law was borrowed from the Code Nap., art. 106, on which Paillet says: "Ainsi, les ambassadeurs et les envoyés, les consuls du commerce dans les ports où pays étrangers, les préfets, &c., et, en un mot, tous ceux qui se transportent hors du lieu de leur demeure habituelle pour remplir des fonctions dont il y a lieu de croire qu'ils seront déchargés après un certain tems, ou qui peuvent leur être ôtées à la volonté du gouvernement, ne sont point censés renoncer à leur domicile pour l'acquérir dans le lieu où ils doivent exercer ces fonctions." Duranton, vol. 1. No. 362, says, also: "Pour les fonctions temporaires, telles que celles de député, ou qui sont révocables, comme celles de procureur du roi, préfet, &c., leur acceptation ne forme point une présomption que le fonctionnaire a l'intention de changer de domicile. En conséquence, il conserve celui qu'il a, tant qu'il n'a pas manifesté d'intention contraire." This doctrine seems to us perfectly correct. It is in accordance with the provisions of our Code, and we feel no hesitation in coming to the conclusion that Edward Livingston, successively Senator in Congress, Secretary of State, and Ambassador to France, retained his ancient domicile in Louisiana; it not having been shown that he ever did any act which evinced any intention on his part to acquire a domicile elsewhere.

But it has been insisted, that he was really absent from this State; that he never returned; and that the expression "reside" used in article 3442 of our Code ought to be construed literally, and not technically. On this subject, we must again refer to some French commentators. It will be conceded, however, that although Edward Livingston resided, literally speaking, several years in the city of Washington, and subsequently at Paris, his residence *de facto* was merely accidental, and temporary; and that, under the doctrine above established, he still had his residence *de jure* or legal domicile in Louisiana. Troplong, Prescription, No. 866, puts the question: "Mais que devrait-on décider si la résidence de fait se trouvait en opposition avec le domicile de droit? par exemple, ayant mon domicile de droit à Paris, d'où je suis originaire et où je conserve l'esprit de retour, je demeure habituellement à Nancy. Nous pensons que l'unité de domicile, qui est

une des bases du Code Civil, devra faire prononcer que je suis absent, bien que l'immeuble possédé par le tiers détenteur se trouve dans le ressort de ma résidence. *Le droit l'emportera sur le fait, &c.*" The reverse of the case put by Troplong, as an illustration of his doctrine, presents exactly, under a direct application of the rule which he establishes, the same question which we have under consideration. Thus if, having my legal domicil, (*domicile de droit*) at New Orleans, where I intend to return, I reside habitually at Washington, it must be decided, (being considered as absent from the latter place,) that I am present in Louisiana, where the property is situated, although such property, possessed by a third possessor, be out of the limits of my place of residence (in the literal sense of the word), and that the time necessary to acquire the prescription will not run *inter absentes*. In No. 870, Troplong proceeds to examine the question in its consequences, and explains the dangers that would result from the adoption of a contrary rule, to wit, "à faire prévaloir la résidence sur le domicile." He says: "Sans doute, d'assez grands embarras auraient pu survenir dans la pratique, si la loi eût voulu qu'on tint compte de toutes les allées et venues, de tous les déplacemens du propriétaire. Mais telle n'a jamais été sa pensée. Elle a pris pour base fixe le domicile, qui, quoique doué d'une mobilité favorable aux intérêts privés, ne change pas cependant par des circonstances légères, et est censé rester toujours le même malgré des voyages et même de longues absences. L'on verra donc ici une nouvelle raison d'adopter l'opinion que j'exposais au No. 866, savoir, que la présence ou l'absence du véritable propriétaire se règle non pas sur la résidence, mais sur le domicile, seule base que présente quelque chose de fixe." The same doctrine is also entertained by Vazeille, No. 504, who is in favor of the legal domicil (*domicile de droit*); and it appears to us so clear, though controverted by Pothier, Prescription, No. 107, and by Delvincourt, vol. 2, p. 656, note, who are both of a different opinion, that it does not require any further comment or discussion, and we cannot refrain from adopting it in our jurisprudence. We shall, therefore, conclude that Edward Livingston having retained his legal domicil in Louisiana, could not be considered as residing out of the State; and that, under the circumstances of this case, the defendants had

Gay v. Kendig.

acquired the prescription of ten years against his representatives, previous to the institution of this suit.

From the view we have taken of the question of prescription, we have not thought proper to examine and investigate the question of ratification, also relied upon by the defendants, and upon which the inferior judge appears to have based the judgment appealed from. But, had it been necessary, we are not ready to say that we should not have come to the same conclusion.

With regard to the alleged informalities upon which the plaintiff relied, in his attempt to attack the validity of the marshal's sale which forms the original title of the defendants, we cannot forbear remarking that, under the principles above recognized, the prescription of five years established by the fourth section of the act of the 10th March, 1834, entitled "an act relative to advertisements," ought also to prevail; and this alone would be sufficient to defeat the plaintiff's pretensions.

Judgment affirmed.

DAVID GAY v. BARNARD KENDIG.

To entitle a party to a third continuance on the ground of the absence of the same witness, he should show the materiality of the testimony, and such extraordinary diligence as to satisfy the court that it was absolutely impossible to procure the evidence.

The holder of a note given for the price of a slave, will be entitled to interest from maturity, though the note contained no stipulation to that effect, and was not protested. C. C. 2531, 2532.

APPEAL from the City Court of New Orleans, Cooley, J.

This was an action by the endorsee of a note given for the price of a slave, made by the defendant, and payable to the order of one Noe, by whom it was endorsed. On the back of the note, and of the same date with it, was a memorandum in these words, signed by Noe: "If the negro boy, William, for whom this note is given, shall die of diarrhea within six months from the date hereof, this note shall be null." The answer alleged that the

slave was afflicted, at the time of the sale, with a complication of diseases, which the seller had represented as easily curable; that the diseases were redhibitory, and proved to be incurable; and that he died thereof within six months from the date of the sale. The defendant having obtained two continuances on the ground of his inability to procure the attendance of a particular witness, by whom he expected to establish that the slave did die, within six months, of the disease mentioned in the memorandum, applied for a third continuance on the same grounds. The affidavit, on which the third application was based, was to this effect: "That the defendant had used every effort to find the witness, but without success; that he expects to be able to find him; that the witness had left his former residence, without leaving any information as to where he had moved other than that he was coming over to this city; that defendant believes witness to be in the city, and that he may be found; that he expects to prove by him that the slave died within the time, and of the disease mentioned in the endorsement on the note; that the application for a continuance is not for the purpose of delay; and that he has made inquiry, or caused it to be made for the witness, wherever he thought it probable that he could be heard of." The continuance was refused, and a judgment rendered for the plaintiff.

In this court, the case was submitted, without argument, by *Stevens*, for the plaintiff, and *Bartlette*, for the appellant.

SIMON, J. This suit is brought on a promissory note, given as part of the price of a slave sold by one James Noe to the defendant. The answer admits the execution of the note; but it is alleged that "the slave, in consideration of which it was given, died within six months from the date of the sale, of a complication of diseases and maladies, which the vendor represented as easily curable, &c." The case was continued twice on the affidavit of the defendant, who at length was ruled to trial, notwithstanding his efforts to continue it a third time; and, having been tried on its merits, judgment was rendered in favor of the plaintiff, with legal interest from the maturity of the note until paid; from which judgment, after an unsuccessful attempt to obtain a new trial, the defendant has appealed.

This case presents only one question—whether the defendant

was entitled to obtain a third continuance, on the production of a third affidavit showing the absence of the same witness? The affidavit seems to us insufficient. The defendant does not state that he ever expects to obtain the evidence of the witness, nor when his testimony can be procured. It says that he expects to be able to find him, and that he does not know the residence of the witness; but he does not show that he has used any effort to find it; and if he did use any such effort, the affidavit does not state what efforts were made. The case had been continued twice on the same showing, and we think that to be entitled to a third continuance on the same ground, the defendant should have shown, that he had used, every time, such diligence as to satisfy the court that it was absolutely impossible to procure the evidence, and that there was really a prospect of obtaining the testimony. On the third application, he should have shown *extraordinary diligence*, as well as the real importance and materiality of the testimony. Not having done so, we are satisfied that the continuance was properly refused. 17 La. 151. 19 Ib. 298.

On the merits, it does not seem to us that any error has been committed. The evidence adduced in support of the defence is quite unsatisfactory; and nothing, in our opinion, has been shown to establish that the defendant is in any manner entitled to the relief by him sought for. The consideration of the note being the price of a slave, legal interest was properly allowed from the time of its maturity. 3 Mart. N. S. 185. 6 La. 730.

Judgment affirmed.

JEAN BAPTISTE LAMBERT v. HIS CREDITORS.

A marriage contract, executed before a notary, which attests that a sum was received by the husband from the wife, as a part of her dowry, in the presence of himself and the subscribing witnesses, is the best evidence of which the payment is susceptible. But it may be rebutted by evidence establishing collusion, as that the money had been obtained only for the moment and had been repaid.

APPEAL from the District Court of the First District, *Buchanan, J.* This was an opposition to a tableau of distribution

filed by Jean Baptiste Lambert, as syndic of his own creditors. The opposition alleges that the tableau allows \$1195 15, to Marie Angelique Lambert, wife of the insolvent, in part payment of her dotal rights; that the wife brought no property in marriage, and has no claim to any dower; and that the husband has colluded with her for the purpose of defrauding his creditors. It prays that the tableau may be amended by rejecting the allowance to the wife, and placing the opponent thereon as a mortgage creditor for the amount of a judgment obtained against the insolvent previous to his surrender, and as a privileged creditor for certain costs. The opposition having been dismissed, Bowman, the opponent, appealed.

J. F. Pepin, for the syndic. The judgment should be confirmed. The dowry (*dot*) was paid by the wife, in the presence of the notary and witnesses. The proof of payment is complete, both as to the parties, and third persons, unless the notarial act itself be proved to have been a forgery. Civ. Code, 2233. 2235. Code Nap. 1319, 1320, and note of Paillet. Pothier, liv. 8, tit. 143—149. In the cases of *Buisson v. Thompson*, 7 Mart. N. S. 460, *Lucket v. Lucket, et al.*, 11 La. 246, and *Dimitry et ux. v. Pollock, et al.*, 12 Ib. 296, and in other cases, this court very properly decided that the acknowledgment of the husband alone is no proof of payment. But in none of these cases had the money been paid in the presence of the notary and witnesses.

In this case the opposing creditor must prove fraud. Civ. Code, 2333. It will not be presumed. *Fort and wife v. Metayer, et al.*, 10 Mart. 436. *Delee v. Watkins, et al.*, 2 La. 309.

L. Janin for the appellant. The only question presented by this case is, whether the statement of the notary that the money was paid in his presence, is sufficient proof of the rights of the wife?

This question was examined in the case of *Buisson v. Thompson*, 7 Mart. N. S. 461. The court quotes Febrero, who says: "Lo que constituye la verdadera dote, es su numeracion, no la escritura. Nada aprovechara (la muger) la confesion; y por consiguiente necesitara probar su *numeracion y entrega*." Lib. 3, cap. 3, § 2, No. 138.

1 Tapia 53. "Pero aunque el marido confiese haber recibido

la dote, si por otro medio no se justifica su numeracion y entrega, no gozará del privilegio dotal; y asi aunque perjudique totalmente al marido y sus herederos extraños au confesion, mas no á sus acreedores."

The money must be both counted and paid over. Indeed, without having seen the money counted, the witnesses could not have that certain knowledge which is indispensable, to enable them to give positive testimony. It would not be sufficient if they were to state, that they saw a bag delivered apparently of the size and weight of those in which one thousand dollars are contained, or a check for the like sum, or a bundle of bank notes at which they glanced only superficially.

The authorities cited do not say, that the notary's statement shall be sufficient to prove that the money which was paid by the wife, was also her property. The notary can only attest what he saw, viz. the counting and payment of the money. When he relates the declaration of the wife, that the money was hers, he gives it no additional weight; and, if the acknowledgments of the husband are presumed to be fraudulent, (1 Tapia 53, No. 5,) the declarations of the wife in her own favor can certainly not be considered better evidence. To acknowledge the momentary possession of the money as proof of its ownership, would be to defeat the jealous policy of the law, and to hold out a temptation to fabricate evidence without the fear of detection. This is, nevertheless, what the District Court held. And to support this proposition, the appellant cites 8 Toullier, 227. *Buisson v. Thompson*, 7 Mart. N. S. 460. *Luckett v. Luckett*, 11 La. 245. *Fennessee v. Gonsonlin*, 11 La. 422. *Dimitry v. Pollock*, 12 La. 303. These authorities tend directly to the contrary conclusion, to wit, that the notary's declaration, that the wife paid a sum of money as her dower, in the presence of the notary, to the husband, is not sufficient evidence against the husband's creditors of the wife's rights. Toullier, in the passage quoted, vol. 8, p. 226, No. 150, illustrates art. 1319 of the Code Nap., literally the same as art. 2233 of the Code of this State. This art. declares that, "the authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery."

Here we are investigating the effect of the act upon *third persons*. Yet the act produces certain effects upon third persons. The declaration of the notary of *what passed in his presence*, we admit to be evidence against them until disproved. Thus the counting of the money, its payment to the husband, its kind and description, might be proved by the notary's declaration in the act of what he and the witnesses saw. But does that prove that the money belonged to the future wife, or to whom it belonged? If the act states this, it is on the declaration of the parties; it is no longer the personal attestation of the notary. This vital distinction is made by Toullier, *loco citato*: "Quant aux choses dont le notaire n'a pas été témoin, parcequ'elles ne se sont point passées en sa présence, qu'il ne rapporte que sur la foi des parties, ou de l'une d'elles, il est évident que le témoignage du notaire, n'a plus la même authenticité. Ce n'est plus qu'un témoin qui dépose sur un oui dire, et dont la déposition ne peut avoir plus de force que n'aurait celle de l'individu sur la foi duquel il rapporte les faits ou les circonstances."

But we need not consult foreign juriconsults on this subject, on which our own jurisprudence is fully settled. "The law views with jealousy all acknowledgments from the husband to the wife admitting the receipt of money. *Beard v. Bijoux*, 8 Mart. N. S. 463. As to creditors, the receipt of the money must be proved otherwise (7 Mart. N. S. 460. 8 Ib. 462. 11 La. 246); not even a judgment obtained by the wife against the husband is evidence against them, if they allege fraud, (8 Mart. N. S. 462. 11 La. 422,) or even that it was obtained by consent. *Dimitry v. Pollock*, 12 La. 302. The wife is bound to prove her rights contradictorily with them. The judgment may be entirely disregarded by the creditors, and the court will not inquire how it was obtained. 12 La. 302. The rights of the wife are to be proved, not by *prima facie*, but by *conclusive* evidence. 7 Mart. N. S. 460. 12 La. 303, 304.

In the last case the judgment is called *prima facie* evidence, though it might have been the result of the testimony of disinterested witnesses who gave their testimony in court. And could the declaration of the wife, that the money which she produces before the notary is *hers*, be considered as *conclusive evidence* of

the fact? By maintaining such a proposition, the court, while endeavoring to uphold an important principle, would at once indicate an easy and safe method of evading it. In our state of society nothing can be easier then for persons possessed of the cunning necessary for fraudulent practices, to procure for half an hour the loan of a sum of money, were it only from one of the witnesses present. Nay, such precautions, so unusual and so little harmonizing with the mode of doing business in this city, are calculated to excite increased suspicion; and it may be believed without much difficulty, that, by such devices, the insolvent bridegroom attempted to secure both a wife, and the property which impending judgments were about wresting from him.

J. F. Pepin, in reply. It is unimportant that the act does not state, literally, that the money was counted in the presence of the notary. "*L'acte authentique*," says Merlin, "*fait pleine foi non seulement de ce qu'il atteste directement, mais encore de ce qu'il atteste indirectement ou obliquement, c'est à dire de ce qui est une suite nécessaire et infallible.*" Repert. de Jurisprudence. 4 Dalloz. Dict. Général et Raisonné, *verbo*, Preuve Littérale—Foi due aux Actes Authentiques. The possession of the money, though it should not be considered conclusive as to the right of property, is *prima facie* evidence of it. The possession of moveables is a presumption of title.

MARTIN, J. Bowman, one of the creditors, is appellant from a judgment overruling his opposition to the claim of the insolvent's wife to the sum of \$1195 15, on the ground of collusion between her and her husband, and on an allegation that she brought nothing in marriage. Her marriage contract attests, that a sum of \$2000 in current money was received by the husband in the presence of the notary and the underwritten witnesses, proceeding from her gains and economy, and brought by her in marriage as part of her *dot*. The appellant's counsel has contended, that the fact of the two thousand dollars proceeding from her gains and economy, does not establish that the money which the notary and witnesses attest that they saw her pay, was her own; that her declaration of the manner in which she obtained it, is no evidence against the creditors, as she might have borrowed it even from one of the witnesses, who, without losing sight of it, might have regained pos-

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session as soon as he and the parties left the notary's office. All this is very true. The first judge concluded that the attestation in the marriage contract, that the two thousand dollars were paid by the wife to the husband in his presence and that of the witnesses, is *prima facie* evidence of its having been legally paid, and that, no proof to the contrary having been offered, her claim must be sustained. The attestation of the notary that payment had been made in his presence and that of the witnesses, is the best evidence of which the payment is susceptible. None higher can or need be adduced. It is, indeed, susceptible of being rebutted, as by evidence of possession of the money having been momentarily obtained, and of its having been immediately after the act repaid by the husband to the lender, as urged by the appellant's counsel; but the record affords not a tittle of evidence from which this may be suspected in the present case.

Judgment affirmed.

ANDRÉ BIENVENU ROMAN, Governor of the State of Louisiana,
for the use of James Corlis v. SAMUEL JARVIS PETERS and
others, Sureties of Charles F. Hozey, late Sheriff.

WILLIAM M. PECKSLAY v. CHARLES F. HOZEY, late Sheriff, and
his Sureties.

JOHN MORGAN HALL and others v. THE SAME.

Where, subsequently to the execution of the official bond of a sheriff, a new office is created, by which his duties and emoluments are altered or diminished, his sureties will be discharged from any liability, either to the state or to third persons, for his future conduct. The contract cannot be changed without their consent; and no act was required to be done, on their part, to exempt them from future responsibility.

THE first of these cases was brought up from the District Court of the First District, *Buchanan, J.*, and the two last from the Commercial Court of New Orleans, *Watts, J.* Judgments hav-

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ing been rendered against the defendants in each case, they have appealed.

Eggleston, Potts, and T. Slidell, for the plaintiffs.

Micou, for the appellants.

BULLARD, J. These three appeals are from judgments rendered against the sureties of Hozey, the late sheriff of the parish of Orleans, on his official bond. In all the cases the money received by him came into his hands in the summer and autumn of 1840, after the promulgation of the act of the legislature creating the office of Sheriff of the Criminal Court, which was carved out of that held by Hozey, during the time for which the appellants were his sureties.* The question, therefore, presents itself, which was ably argued at the bar, whether the change produced by that act, by curtailing the duties and emoluments of the office, operated the release of the sureties?

The appellants signed the bond in March, 1839, and the office was limited to two years. At that time the sheriff of the parish of Orleans was, *ex officio*, keeper of the public prison, and it was his duty to serve all process in criminal as well as civil cases, and he was entitled to all the emoluments and perquisites of that office. By an act of the 18th of March, 1840, the office of Sheriff of the Criminal Court of New Orleans was created. The second section of that act provides, "that, thereafter, the present sheriff of the parish of Orleans shall cease to be an officer of said Criminal Court, and all writs, orders, warrants and other process of said court shall be directed to the sheriff of the Criminal Court of New Orleans, and shall be by him served and executed; and said sheriff of the Criminal Court shall thenceforward possess all the powers, and perform all the duties, which are now vested in or are performed by the sheriff of the parish of Orleans, as the ministerial or executive officer of said Criminal Court, and shall be entitled to demand and receive the same compensation and emoluments therefor, as are now received by the said sheriff of the parish of Orleans." The new sheriff was required to give bond in the sum of thirty thousand dollars.

* This act was approved 18th March, 1840. See Sess. Acts, p. 40.

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It is contended, on the part of the sureties, that this act produced so material a change in the office of sheriff, so completely dismembered it, that they were no longer bound; that their inducement to become sureties of the sheriff, was the emolument which the office afforded when they signed the bond; that they bound themselves for the sheriff of the parish, such as the office was at that time, and not as it would be after being shorn of important powers, duties and perquisites.

"The law is particularly watchful over the rights of sureties; and will not countenance any transactions between the parties, that shall lessen the ability of the principal to comply with his contract, or that shall alter the rights of the parties, or enlarge the demand to the prejudice of the sureties. To permit parties to modify and alter their contracts as they please, and to hold the sureties answerable for the performance of such parts as were not altered, would be transferring their responsibility, without their consent, from one contract to another. The contract, by the modification and alteration, becomes a new and a different contract, and one for which the sureties never became responsible." Such was the language of Judge Thompson in the Circuit Court, in the case of *The United States v. Tillotson*, who was surety on a contract for the erecting of certain military works at Mobile Point. A slight modification had been made between the Government and the principal contractor, by which the latter was permitted to use tapia instead of brick masonry on a part of the works, at one dollar less per cubic yard than had been agreed on for brick masonry. The surety was held to be discharged.

In this case the alteration was apparently advantageous to the surety, but the court held that it could not be taken into consideration whether it was advantageous or prejudicial; that this was a matter upon which the sureties had a right to judge for themselves; and that it was not in the power of the plaintiffs to transfer the suretyship from one contract to another. Paine's Reports, 305. Our attention has been called to a remarkable case from the English books, which illustrates the principle that the parties cannot modify their agreements without the consent of the surety, without discharging the latter. James, the defendant, became surety for the hire of thirty milch cows for one year. The par-

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ties afterwards, without consulting the surety, modified the agreement in such a way as that thirty-two cows were given for one-half the year, and twenty-eight for the other half. It was held that the surety was discharged. Mr. Justice Bayley said, "this was an entire contract for the purchase of thirty cows, and if, at the commencement of the term, the plaintiff could not insist that this was a divisible contract, it must follow that it continued an entire contract during the term. It is sufficient to say that there was a new arrangement without the knowledge of James." Theobald on Surety and Agency, 76. In the 9th volume of Wheaton's Reports, page 680, we find the case of *Miller v. Stewart*, in which the Supreme Court of the United States held, that the contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms. Where a bond was given conditioned for the faithful performance of the duties of the office of deputy-collector of direct taxes for eight certain townships, and the instrument of appointment referred to in the bond was afterwards altered so as to extend to another township, without the consent of the sureties, it was held that the surety was discharged from his responsibility for moneys subsequently collected by his principal. Judge Story, in delivering the opinion of the court, remarks: "To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by the change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract." The judge continues: "it is no answer to say that it is not intended to make him liable for any money, except what was collected in the eight townships. He has a right to stand upon the terms of his bond, which confine his liability to money received under an appointment for eight townships."

In the case now before the court, the defendants became the sureties of Hozey, for the faithful performance of his duties as sheriff of the parish of Orleans. In that capacity it was his duty to serve all process out of all superior courts, both civil and criminal. He was, *ex officio*, jailor, and was entitled to large emoluments for the keeping and maintenance of prisoners, and the transportation of convicts to the penitentiary. He was entitled to cer-

Roman, Governor, for the use of &c., v. Peters and others, Sureties of Hozey.

tain extra allowances for his services in criminal cases. It must be considered that what might be the probable emolument of the office, such as it then existed, and how far they might safely guaranty his good conduct in the discharge of his duties, entered into the contemplation of the sureties. The act of the 18th of March, 1840, creating the office of sheriff of the Criminal Court, and depriving Hozey of all its emoluments as well as patronage, left the office of sheriff of the parish of Orleans materially different from what it was when the bond was given. The importance of the new office of sheriff of the Criminal Court, may be estimated by the fact that he is required to give bond with security in the sum of thirty thousand dollars, one half the amount of the bond given by the sheriff of the parish. This act produced a change in the condition of things which could not have been anticipated. The defendants consented to become the sureties of Hozey in his original office, with all its powers, patronage, and emoluments; but *non constat* that they would have consented to become so merely in his capacity of sheriff of the courts of civil jurisdiction. The name remained but the substance was gone; and the suretyship of the defendants cannot be moulded, without their consent, so as to apply to this altered condition of things.

These principles are not denied by the opposite party, but their application to official bonds given to the State by public officers is contested; and it is asserted that any change produced in the contract by the agency of a third person, causing an increased responsibility of the surety, will not discharge the latter, if the creditor has merely been inactive or passive. But we cannot regard the State as a stranger to this contract. On the contrary, if the State could not recover on the bond in consequence of the change of the office, neither can the party who alleges himself to be aggrieved by the malfeasance of the sheriff. The law, it is true, gives to individuals a right to sue upon the bond; but the State must be considered as the principal party to the contract.

It is further said, that the sureties had it in their power to cause themselves to be released, and new sureties to be given. To this it may be answered, that no act on their part was required to be done in order to save them from farther responsibility, if such a change had been produced as sufficed to release them as sureties

Elmore v. Bell.

on the bond. They are authorized to look to the circumstances and the condition of things, as they existed at the time they signed the bond; and if the condition of things had been changed, and the office no longer existed such as it was, they had a right to consider themselves as no longer bound.

* It is, therefore, ordered that the judgments appealed from be avoided and reversed respectively, and that ours be for the defendants, with costs in both courts.

WILLIAM AUGUSTUS ELMORE v. SAMUEL BELL.

Errors in the return of process should be amended so as to make the return conform to the truth; and the party entitled to demand such amendment, cannot be deprived of the right, by the expiration of the term of service of the sheriff or deputy sheriff who committed the error. Nor is it any objection, that the amendment will affect rights acquired by third persons.

A sheriff may amend his return, even after a contest in which its validity is attacked.

APPEAL from a judgment of the Parish Court of New Orleans, Maurian, J.

W. W. King, for the appellant.

Chinn, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment discharging a rule, which he had obtained against the defendant, to show cause why the sheriff should not pay him a sum of money, to wit, one thousand dollars, more or less, which remains in the hands of that officer after having satisfied the claim of Florance on an order of seizure and sale obtained against Morrison, and directing the money to be paid to the defendant. The plaintiff and appellant claimed the money in the hands of the sheriff, as the owner of the property sold on the order of seizure and sale, under a conveyance from Morrison, who had mortgaged it to Florance, with the clause *de non alienando*. The sale of Morrison to the plaintiff was *sous seing privé*, executed in the State of Kentucky, and recorded in Mason county in that state, and afterwards in the office of the Register of Conveyances in the city of New

Orleans. It is dated the 27th of May, 1841, and the registry in New Orleans took place on the 30th of June following. The instrument *sous seing privé* was acknowledged by the vendor before a notary public in the State of Kentucky.

The defendant claimed the money on the following grounds: He had attached the land sold by the sheriff at the suit of Florence, in an action instituted by himself against Morrison, in which he obtained a judgment, and took out an execution, which was levied on the money in the hands of the sheriff, now claimed by himself in the rule. It is objected that the sheriff first returned that his execution had been levied on the 30th of June, 1841; and that afterwards he procured an amendment of the return, whereby the execution appears to have been levied on the 29th. That according to the first return, he was entitled to no priority over the present plaintiff and appellant, who recorded his title in the office of the Register of Conveyances, on the day the execution was levied; and that the court erroneously permitted an amendment which gave to the defendant and appellee a priority over his adversary. It was farther objected, that the return of the execution was made and amended by one, who had ceased to be a deputy sheriff when he made the amendment. The parish judge sustained these objections.* In our opinion he erred. Errors in the return of a process may be amended, and, indeed, must be, when the object is to make the return conform to truth; and the party who is entitled to demand the amendment, cannot be deprived of it by the office of the sheriff or deputy sheriff, who committed the error, having expired. Neither is the circumstance that the amendment affects rights acquired by third persons, sufficient to prevent it. In the case of *Aubert v. Buhler*, 3 Mart. N. S. 489, we held, that a sheriff may amend his return, after a contest in which its validity is attacked. See also, 1 Johnson's Cases, 31. 5 Johnson, 89. 9 Ib. 384. 3 Caines, 98. 1 Cowen, 413. 11 Mass. 413, 477. 1 Taunton, 322.

The defendant and appellee has clearly shown his right, by the

* He dismissed the rule, however, on other grounds, unnecessary to be noticed.

The Union Bank of Louisiana v. Desban.

levy of his execution against Morrison, to the money in the sheriff's hands.

Judgment affirmed.

THE UNION BANK OF LOUISIANA v. JAMES DESBAN.

Defendant purchased certain shares of stock in the Union Bank of Louisiana, binding himself to pay plaintiffs a balance due thereon by his vendor. In the contract of sale the latter bound himself to transfer the stock to defendant on the books of the Bank. On an application to the Board of Directors, under the 29th section of the act of 2d April, 1832, incorporating the Bank, to allow a transfer of the stock, the proposition was approved by a majority of the Board, as required by law. The Bank having subsequently sued for the amount due on the stock assumed by defendant, the latter pleaded that he could not be made liable till the stock was transferred to him. *Held*, that the stipulation that the vendor should transfer the stock on the books of the Bank, meant only that he should cause the defendant to be recognized as a stockholder on its books; and that the contract was complete as to all parties interested, on the execution of the act of sale made under the authority of the Directors.

APPEAL from the Parish Court of New Orleans, *Maurian, J.* This case was submitted, without argument, by *Greiner*, for the appellant, and *Denis*, for the plaintiffs.

SIMON, J. The defendant is appellant from a judgment which condemns him to pay the sum of sixteen hundred dollars, with ten per cent interest per annum, from the 1st of March, 1837, until paid.

By a notarial act passed on the 28th February, 1837, John G. Banks sold to the defendant several lots of ground with the buildings and improvements thereon erected, and also forty shares of the capital stock of the Union Bank of Louisiana, for the sum of ten thousand and forty dollars, sixteen hundred of which the defendant obligated himself to pay to the plaintiffs, *being the balance due to the Union Bank from the said John G. Banks, on the forty shares of stock transferred by the said notarial act.* The vendor further agreed to transfer the forty shares sold by him, on the transfer book of the Bank. It appears, in evidence, that a few

days previous to the sale and transfer made by John G. Banks to the defendant, an application was made by him to the Board of Directors of the Union Bank, who, at their meeting of the 23d of February, consented to the transfer subsequently executed, the stock so transferred to be secured on the property sold by John G. Banks to the defendant, which was already mortgaged in favor of the Union Bank to secure the same stock.

The defendant having failed to comply with his obligation, the present suit was instituted, which he attempts to resist on the ground that he is not liable until the condition contained in the act of sale is complied with, to wit, the agreement of the vendor to transfer the bank stock mentioned therein to him. The court below, in rendering judgment in favor of the plaintiffs, ordered that its execution should be stayed until the transfer to the defendant be made, on the books of the Union Bank of Louisiana, of the forty shares of stock sold him by John G. Banks. Sometime afterwards, the certificate of the Cashier of the Union Bank was produced, filed and recorded, in the words following, to wit :

“ Union Bank of Louisiana, 25th April, 1842.

“ I hereby certify that the forty shares of stock of this Bank sold by John G. Banks to James Desban, according to the within act of sale, were transferred by me by virtue of said act on the books of this Bank, on the 19th of March last.

“ FRED. FREY, Cashier.”

Whereupon, the inferior court, considering that the condition of the judgment had been satisfied, ordered the rule taken by the defendant on the plaintiffs to show cause why the transfer of stock should not be set aside, to be discharged ; from which two judgments the defendant has appealed.

The facts disclosed by the evidence show clearly, that the sale and transfer of forty shares of the capital stock of the Union Bank of Louisiana were made by John G. Banks to the defendant, with the consent and approbation of the Directors. This was in compliance with the 29th section of the charter which provides, (Acts of 1832, page 65,) that “ whenever application shall be made by a stockholder to transfer his stock and be discharged, such transfer and discharge may take place upon the new stockholder’s furnish-

ing mortgage to the satisfaction of at least a majority of all the Directors ; and, in all such cases of transfer and discharge, the vote shall be taken by yeas and nays." Under this section of the charter we understand that, when a stockholder intends or wishes to transfer his stock, the first step he has to take is to apply to the Board of Directors, to lay before them a statement of the circumstances under which the transfer is to be made, and of the new mortgage or securities which are to be furnished ; and that, if his proposition meet the approbation of a majority of all the Directors, he may then proceed to execute his deed of sale or transfer, which is to be considered as accepted beforehand by the Bank, and also the act by which the new mortgage or securities are to be given, without perhaps any other formality than spreading the name of the new stockholder and his number of shares on the books of the Bank. This last formality, however, if required, adds nothing to the validity of the transfer, which, being made with the consent and previous authorization of the Directors, has as much force and effect as if regularly accepted by a subsequent act. All this appears to have been done in the present case ; and although the act of sale contains a stipulation that the vendor is to transfer to the defendant his forty shares on the transfer book of the Bank, the only meaning of which undoubtedly was that he should cause the defendant to be recognized as a stockholder on the books of the Bank, we think that the contract was complete with regard to all the parties therein interested, and was binding upon them, and upon the Bank which had previously permitted and authorized its execution, immediately after the act of sale and transfer had been duly executed. To require more in order to give effect to the transfer, would be superfluous, and is not contemplated or provided for by the charter.

The defendant was, therefore, bound to pay the sum of \$1600 to the plaintiffs, immediately after the execution of the act of sale ; and having thus made himself a debtor of the Union Bank, he became also obligated to pay the interest of ten per cent promised by the act of John G. Banks, in conformity with the 24th section of the charter. As he stood in Banks' place towards the Bank, from having assumed the mortgage executed by his vendor on the

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10th of October, 1835, he necessarily became subject to the same obligations.

Judgment affirmed.

THE PLANTERS BANK OF MISSISSIPPI v. CHARLES S. CRANE.

The vendee may, generally, establish the sale, by proof of the acts and admissions of his vendor. Where fraud is suspected, the admissions of the alleged vendor, must be received with caution, but cannot be absolutely rejected.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This case was submitted, without argument, by *Micou*, for the plaintiffs, and *Maybin*, for the appellant.

MARTIN, J. Roach having intervened in this suit to claim the cotton attached by the plaintiffs, is appellant from a judgment dismissing his intervention. The facts of the case are these. The cotton is the produce of the plantation of the defendant, who carted it to the landing, and marked it with the initials of the intervening party. The evidence shows that the latter is a planter, not a dealer in cotton, and that he had not been in the neighborhood for six or eight weeks before. The first judge was of opinion that these circumstances threw upon him the burden of the proof of his having purchased the cotton, or received it in payment of a debt due to him by the defendant.

Our attention is drawn to two bills of exception. The first is taken by the intervenor to the opinion of the court allowing the plaintiffs, in reading certain depositions, to pass over what the witnesses declared they had heard the defendant say. The second is to the admission of the plaintiffs' pretensions to prevent the intervening party from reading that part of the deposition of his witnesses, which relates to what they heard the defendant say. Both the appellant and appellees admit that the cotton was originally the property of the defendant. The appellant contends that he acquired it from the latter by purchase, or *dation en payement*. Whether the cotton was thus acquired, is the point upon which the appellant and appellees are at issue. Generally, the vendee

can establish the sale, by proof of the acts and admissions of his vendor. There are cases, indeed, in which the admissions may be suspicious ; and fraud may be suspected when two persons claim the property. In such cases the admissions of the alleged vendor must be received with caution ; but we are unable to say that they ought to, or can be absolutely rejected. The vendor's receipt for the price, is the best *prima facie* evidence by which the vendee may establish the sale. Can it be said that written evidence, under the hand of a party whose oral declarations must be rejected, can be admitted ?

It appears to us that the judge below erred. On the merits : The cotton was attached in the hands of the consignees, who were in possession of a bill of lading showing that the cotton was shipped by the intervenor, who has proved that the defendant told a person, who applied to him to purchase cotton, that he had made a conditional sale of his to the intervening party, and afterwards that the sale was effected. The overseer of the intervenor deposed, that he is of opinion that the defendant was indebted to his employer, and that the cotton was brought to the landing by the defendant in part payment of his liability. But the witness does not give us any other grounds for his opinion, than the knowledge he had of the dealings of the defendant with his employer. The defendant's overseer deposes, that his employer told him that he had one hundred bales of cotton at the landing, which he was to mark for the appellant ; and that he afterwards marked them accordingly. The witness had the cotton piled with that of the appellant on the bank of the river, his employer telling him that he had nothing more to do with it, and that the appellant's overseer would ship it. The present case certainly contains nothing that excludes the possibility of a collusion between the appellant and the defendant, with a view to defraud the appellees and prevent their seizure of the cotton ; but no circumstance in the case shows more than a probability of this. A creditor who loses the opportunity of securing his payment, easily suspects those, by whose interference his endeavors are defeated, of assisting in the fraud which he supposes in his debtor. Suspicion may justify an inquiry ; but, alone, is of no moment in seeking relief at the hands of a court of justice.

Unusual caution creates a suspicion of fraud. The vendor, or-

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dinarily, leaves to the vendee the care of marking the merchandize sold. In the present case, the vendor took that care upon himself. But admitting, even, that there was neither collusion nor fraud between the vendor and the intervening party, the record does not show that the cotton was ever weighed. Cotton is always sold by the pound. The Civil Code provides, art. 2433, that "when goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted, or measured; but the buyer," &c. We have thought it best to remand the case, to afford the appellant and appellees the opportunity of adducing new proofs, if any there be, of their respective pretensions.

It is, therefore, ordered that the judgment be annulled and reversed, and the case remanded, with directions to the judge to allow the reading of the deposition taken by the intervenor, without excluding those parts which relate to the admissions of the defendant, and not to suffer such admissions to be passed over in reading the depositions taken by the plaintiffs; the latter paying the costs of the appeal.

APPLICATION OF THE MAYOR AND FIRST MUNICIPALITY OF THE
CITY OF NEW ORLEANS for the extension of Barrack street.

Where, on an application under the act of 3d April, 1832, for the appointment of commissioners to assess the damage or advantage resulting to the owners of ground, required for the opening or improving of streets or public places in the city of New Orleans, or adjacent to such improvements, it is alleged in the petition that the proposed improvements tend to the benefit and improvement of the whole corporation, the commissioners will be relieved from the duty of inquiring whether they are of a local or general character, and the Municipality, by which they were ordered to be made, will be bound to the owners for whatever amount they would have been liable under the act, had the commissioners expressly declared such improvements to be beneficial to the whole corporation.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Roselius, for the appellants.
L. Janin, for the appellees.

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GARLAND, J.* The appellants presented their petition stating that, at the request of a number of the owners of property on St. Claude street and in its neighborhood, they were desirous of opening Barrack street to the Bayou Road. They aver that the improvement is necessary and conducive to the public interest and convenience, and to the increase of commerce. They ask for the appointment of commissioners to estimate the damage and benefit to the adjoining proprietors, and to do what may be necessary to effect the object. This application was made in consequence of a resolution of the Council, and of the powers granted by the act of the 3d of April, 1832, relative to the opening of streets, &c. B. & C. Dig. 111. A tableau or estimate was made, in conformity to this application, showing the gross value of each piece of property, the name of its owner, its extent, the damage or benefit each would sustain, and who was to pay and who to receive. Some changes were made in it, as later and better information was obtained by the commissioners. Finally, after considerable delay, it was completed, and notice given of its being filed at the instance of the appellants; and all persons interested were called on to show cause, within ten days, why the appraisalment and partition of the funds and other proceedings should not be homologated and confirmed. Moreau, Quertier, and Guesnon abandoned their respective properties to the corporation, as they say they have a right to do under the fifth section of the act. Many other persons opposed the homologation of the proceedings on various grounds; but the corporation, by its regular attorney, urged their confirmation, and had most of the oppositions dismissed, on the ground that they came too late, not having been filed within ten days, as required by the second section of the act. The others were overruled on the merits, and the parties condemned to pay the costs. On the 14th of May, 1839, a final judgment of homologation was rendered, from which none of the opponents appealed; and as the Municipality was successful in obtaining all it asked, no appeal was then prayed for on its part. Things remained in this condition for about six months, the parties in the mean time asking for the payment of the money coming to them on the appraisalment, which,

* This judgment was pronounced on a re-hearing.

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it seems, not being paid, Quertier commenced a suit to recover the amount coming to him, when, suddenly, the Municipality discovered that the judgment obtained by their former attorney was erroneous and highly injurious. An appeal to this court was taken, and all the parties against whom the judgment was rendered, were cited as appellees, although the oppositions of nearly all had been dismissed on a technical objection. They are thus called to show that the proceedings and judgment were regular and correct, and the *actor* in the whole matter is urging their irregularity and illegality, the ordinance directing the opening of the street having been in the mean time repealed.

It is not denied that the attorney of the corporation was fully authorized to pursue the course he did ; and there is ample proof in the record of his authority to act in its behalf. No legal objection to any proceeding in court has been established ; but the corporation now wishes to go back to the estimate made by the commissioners, and to show it to be incorrect.

By reference to the appraisalment of the commissioners, it will be seen that they have assessed the amount each person has to pay for the benefit conferred on his property by opening the street, and also the sum each is to receive for the ground taken for the street, and for injury done to his property. The amount to be received by the corporation is \$4,802, and the sum to be paid to individuals \$27,346, leaving a balance of 22,544 to be supplied. For this sum, the attorney of the Municipality says that it is not responsible.

The act of 1832, sec. 8, provides, that if the commissioners shall deem the improvement to be made not only a local improvement, but also tending to the salubrity, benefit, beauty, or improvement of the whole city, they shall assess such part of the estimate for said improvement to the corporation as they shall deem just and equitable ; and if the corporation own lots and property in the vicinity, it is to be assessed as the property of individuals. The Municipality now avers that, although by the estimate and repartition which it presented for homologation, the deficit of \$22,544 was apparent, yet that the corporation is not responsible for it, as the commissioners have not declared, in express terms, that it shall be responsible as being for a public improvement or convenience.

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We think otherwise. If the corporation, in the first instance, had left the whole question to the commissioners, to say whether the improvement was local or general, there would have been great, if not irresistible force, in the argument of the counsel for the appellants; but the corporation did not leave that question open. The fact of the improvement being of a public nature was so apparent, or the Council thought it so clear, that it was so assumed and stated in the petition for the appointment of the commissioners. If the commissioners had been left to the law as their guide, we are bound to presume that they would have done all that was required of them, and have inquired whether the improvement was local or public. Had they done so, and declared it public, there is no doubt but the corporation would be bound to pay the deficit; *a fortiori* is it bound, when, in the first instance, it admits the improvement to be public, and relieves the commissioners from the duty of making the inquiry. It was, at any rate, calculated to delude the commissioners and all concerned; and the corporation, by its objections to the oppositions, prevented the parties from being heard, or from asking to have the report of the commissioners amended or altered in any respect.

Judgment affirmed.

 ARMAND QUERTIER v. THE FIRST MUNICIPALITY OF NEW ORLEANS.

THE defendants have appealed from a judgment of the Commercial Court of New Orleans, *Watts, J.*, in favor of the plaintiff, for the amount of the appraisement of a lot of ground, abandoned to the defendants, under the provisions of the act of 3 April, 1832, relative to the opening and improvement of the streets and public places in the city of New Orleans.

L. Janin, for the plaintiff.

Roselius, for the appellants.

GARLAND, J. This case arises out of that of the *Application for the extension of Barrack street*, ante, p. 491. Quertier

Ex parte Edward Lafonta.

was placed on the tableau of the commissioners, as one of the persons whose property would be affected by the opening of Barrack street, and the property was appraised at \$4,800, whereupon he abandoned it to the corporation by an authentic act, as he contends he had a right to do, under the 5th section of the act of April 3rd, 1832, relative to the opening of streets, &c. in this city. B. & C. Dig. p. 112. The Municipality having refused to pay him, he sues to recover the aforesaid sum, with six per cent interest as authorized by the above mentioned act. The defence of the Municipality rests upon the principles assumed for the purpose of annulling the judgment of homologation, in the case of the *Application for the extension of Barrack street*. Having decided those grounds to be insufficient, it follows as a necessary consequence that the defence must fail.

Judgment affirmed.

EX PARTE EDWARD LAFONTA.

The act of 28 March, 1840, abolishing imprisonment for debt, by relieving bail from the obligations they had entered into, deprived them of any right over their principal.

In the absence of all evidence, the laws of another State will be presumed to be the same as our own. But where the law is shown to have been the same, the repeal of the law in this State, will not authorize the assumption that it has also been repealed in the other; such repeal, if it exist, must be proved by the party interested to establish it.

Bail may arrest the principal out of the State in which the bail bond was given, and even after the latter has obtained a stay of proceedings.

Bail, when authorized to arrest the principal, may obtain, on the production of the bail piece, the assistance of a sheriff or constable, or an order from a court or magistrate, to arrest such principal.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. Bruce and Hayes are appellants from a judgment which discharges Lafonta on a writ of *habeas corpus*, from their custody, as his bail in a suit brought against him in the State of

Massachusetts, where he was arrested by a writ of *capias ad respondendum*, and obtained his liberty by the execution of a bail bond in which the appellants joined him; almost immediately afterwards, Lafonta came to New Orleans, where they obtained, on the production of the bail piece, from the Commercial Court of this city, an order to the sheriff to arrest him and deliver him to them, in order that they might be enabled to surrender him as their principal, in the court of the State of Massachusetts which had issued the writ on which they became bail. The petitioner having been arrested by the sheriff on this order, obtained from the Court of the First Judicial District a writ of *habeas corpus*, on which he was discharged; the District Court being of opinion that the petitioner was arrested and confined in a case where the law does not allow the issuing of orders of arrest and imprisonment, and that the Commercial Court of New Orleans had exceeded its jurisdiction, as defined by law, in ordering said arrest.

Durell, for the appellants. The judgment of the District Court is erroneous. The principal is considered to be always in the custody of his bail, who may surrender him when they please. 8 Pick. 138. 5 Espinasse, 172. 17 Mass. 169. 2 Comyn, 46, note f. No. 13, No. 18, p. 50. 7 Johns. 144. 2 Mart. 57. The principal may be arrested by the agent of the bail. 1 Moore's Index, 120. 2 Wheeler, 108, No. 2. 1 Johns. Cases, 413. 7 Johns. 144. Code Pract., arts. 233, 234. The principal cannot deprive his bail of the right of surrendering him, by placing the latter on his schedule as an insolvent. The insolvent laws of this State cannot exonerate the bail in Massachusetts. 6 Wheeler, 65, Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10. 4 Condens. Rep. U. S. 423. 3 Mason, 88. 4 Mart. N. S. 277.

No counsel appeared for the appellee.

MARTIN, J. If the appellants had been bail for Lafonta in a suit depending in any of the courts of this State, there is no doubt that he could not be retained by them since the abolition of imprisonment for debt, because the act abolishing it relieved them from all the obligations they incurred by becoming his bail, and consequently deprived them of any right over him. The record shows that the appellants became bail for Lafonta in the city of Boston, on the 30th of August, 1836; that judgment was obtained against

him, and a *scire facias* sued out against them. That, on the 1st of February, 1840, they applied to the Commercial Court in this city, for an order for his arrest, on the production of the bail piece. That the order was immediately granted, and executed by the sheriff. On the 28th of March, the Governor approved the act to abolish imprisonment for debt; and it was promulgated on the 17th of April following. On the 20th Lafonta applied for, and obtained a writ of *habeas corpus* from the Court of the First District, under which he was discharged on the 28th of the same month. The record further shows that the petitioner surrendered his property to his creditors, on the 26th of July, 1839. The decision of the Superior Court of the late Territory, in the case of *Henderson v. Lynd*, 2 Mart. 57, goes the whole length in support of the right of the bail to arrest his principal even out of the State in which bail was given, and after the latter has obtained a stay of proceedings. The record of the proceedings of the court in Massachusetts against both parties now before us, shows that bail is given in that State in the same manner as in this. This has been shown in argument by a reference to the Revised Code of that State; and, in the absence of other evidence of her laws, we are to presume they are the same as ours. On this principle we feel no hesitation in saying, that no possible doubt can exist as to the legal detention of the petitioner by his bail until the 18th of April, 1840. The only point upon which the least doubt can rest is, whether, on the 20th of April, 1840, three days after the promulgation of the act of the legislature abolishing imprisonment for debt, Lafonta was entitled to his liberation, as he would have been, had the bail been given in one of the courts of this State; and whether we are to assume that imprisonment for debt was abolished in Massachusetts, at the same time that it was in this State. It does not appear to us that we can. If the law of Massachusetts, which authorized imprisonment for debt, be repealed, it is a matter which can not be assumed on the mere presumption arising from the repeal of the same law here.

The appellants having shown that they became bound to produce the body of their principal under an existing law of the State of Massachusetts, and at his instance and request, and that they became, consequently, entitled to keep and detain him for that

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purpose, he must show, in order to be relieved, that the law under which they claim the exercise of their rights, has been repealed, if he urges the repeal. The right of the bail to seize his principal being admitted, it follows as a corollary, that, to avoid resistance and to prevent the appearance of a breach of the peace, he may, on the production of his bail piece, obtain the assistance of the sheriff or constable, and also, if necessary, the order of a court of justice or magistrate. We are unable to see on what ground the judge *a quo* concluded that the Commercial Court erred in granting an order of arrest.

It is, therefore, ordered that the judgment be reversed, and that the appellee remain in the keeping and custody of the appellants, his bail, in order that they may surrender him in their own discharge; and that he pay the costs in both courts.

JAMES McMASTER and another v. JAMES S. BRANDER and others.

Putting the defendant *in mora*, is a condition precedent to the recovery of damages for a passive violation of a contract. Such damages are only due after the debtor has been put in default, and the default must be alleged and proved; nor can evidence be received to prove a demand, where it has not been alleged in the petition.

Where, in an action for damages for the non-delivery of goods, the petition contained no allegation of an amicable demand, but defendants averred, in their answer, a tender of the goods made by them subsequently to the commencement of the suit: *Held*, that the tender having been made subsequently to the filing of the petition, cannot cure the omission of an allegation of a previous demand, and give the plaintiffs a right of action.

APPEAL from the District Court of the First District, *Buchanan, J.* This was an action to recover from the defendants, owners of the ship *Harkaway*, damages for the non-delivery of a case of merchandize shipped by the plaintiffs. The petition did not allege that the defendants had been put in default.

Lockett and Micou, for the appellants.

Roselius, for the defendants. The violation of the contract of affreightment, was a passive one, and the plaintiffs cannot recover without proving that the defendants were put *in mora*. Civ. Code, arts. 1925, 1926. The institution of suit did not put defendants

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in default, the action not being for specific performance, or for damages. The default must be alleged in the petition, in order to show a cause of action. This has been established ever since the case of *Erwin v. Fenwick*, 6 Mart. N. S. 23. *Ory v. Winter*, Ib. 606. *Rowe v. Hall*, 1 La. 98. *Taylor v. Chase*, 18 La. 88. The averment of a tender does not supersede the necessity of proving a demand for the delivery of the goods.

SIMON, J. This case was before us in April, 1840, (15 La. 206,) and was then remanded for further proceedings, for the purpose of affording the plaintiffs an opportunity of proving the value of the goods for which, they seek to make the defendants liable. The case went back to the District Court, which, after having received some evidence in relation to the value of the goods, rendered judgment in favor of the plaintiffs, for costs only. From this judgment, the plaintiffs have appealed.

This being a claim for damages for the non-delivery of certain goods and merchandize, in compliance with a contract of affreightment, our attention has been called to the question, whether the plaintiffs could maintain the action, without having alleged in their petition, and without showing that they put the defendants *in mora*, previous to the institution of this suit? This question was not urged on the first trial before us, or, if it was, passed unnoticed, for the reason, perhaps, that as the case was to be remanded for further proceedings to complete the evidence, it ought to remain open until we could get a full view of all the facts and circumstances it was in the power of the parties to adduce in support of their respective pretensions. But now that the case comes back after a new investigation of its merits, and after an elaborate opinion of the inferior judge on the question of default relied upon by the defendants, we think it our duty to examine it fully, as upon its solution will mainly depend the necessity of inquiring into the plaintiffs' right to recover in this action.

This, as we have already said, is merely an action for damages for the non-performance of a contract of affreightment. Its object does not in any manner appear from the petition to be for the specific performance of the contract, nor is the prayer or demand in the alternative; and it is very clear that the alleged violation of the contract, being a passive one, the plaintiffs could not recover

without alleging and proving that the defendants were put *in mora*. This is a pre-requisite, or condition precedent to the recovery of any damages, which are only due after the debtor has been put in default; and as this court said in the case of *Erwin v. Fenwick*, 6 Mart. N. S. 230, it was the duty of the creditor to allege, or, at all events, to prove the facts, without which he had no cause of action. Civ. Code, arts. 1925, 1926, 1927 and 1928. 1 La. 98. 7 Ib. 193. 18 Ib. 90.

But it is contended that the allegations of a tender and delivery of the case of goods, contained in the defendant's answer, on which averment of tender and delivery they voluntarily placed their defence, ought to supersede the necessity of proving that they were put *in mora*. The facts that gave rise to the averment, are these. It appears that, after this suit was instituted, and before filing their answer, the defendants offered the box of merchandize to the plaintiffs, who consented to receive it on condition that it should be expressed in the receipt that the plaintiffs were to hold the defendants liable for damages. The delivery of the case was refused on these terms, and the defendants kept the goods in their possession. We are unable to see in the averment of this insufficient tender, any thing inconsistent with the legal defence that the defendants were not put in default previous to the institution of the suit; nay, far from presupposing a demand, it shows on the contrary that if such demand had been made in due time, the defendants were disposed and even ready to deliver the case of goods in compliance with their contract. At all events, the tender having taken place after the filing of the petition, which contains no allegation of a previous demand of the goods, this subsequent circumstance cannot cure such a defect, and give the plaintiffs a right of action which they had not acquired when they set up their claim to the damages sued for; and it is clear that the defendants were not bound to plead and show a legal tender, since the plaintiffs could not maintain their action.

But it is insisted that, if we should consider the proof of a previous demand indispensable to the plaintiff's recovery, the case must again be remanded for proof on that point. We might perhaps do so, if the allegations of the petition were such as to authorize the introduction of the evidence; but there is not any

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allegation or averment in it that any demand was made; and again, this is a prerequisite which must be specially alleged in order to show a cause of action.

We think the District Court erred in condemning the defendants to pay the costs of the suit; and the judgment below should have been one of nonsuit.

It is, therefore ordered, that the judgment of the District Court be avoided and reversed, and that ours be for the defendants, with costs in both courts, as in case of nonsuit.

JOSÉ PRATS v. HIS CREDITORS.

The provisions of the Civil Code which establish mortgages in favor of minors and married women, at least so far as they are tacit and exist without being recorded, are confined to persons who marry in this State, or receive their appointments as tutors from our courts, or who, after marrying or receiving such appointments abroad, come to reside here; and in the latter case, such tacit mortgages exist only for sums received since their removal to this State.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MORPHY, J. The wife of the insolvent made opposition to a tableau of distribution filed by the syndics, claiming to be placed thereon as a mortgage creditor for \$3800. She alleges that her mother, who died in Campeachy, Mexico, some time in 1822, left her a house in that town, and a sum of \$2800 in specie, which was then received by her husband. That in 1831, after the insolvent had come to reside in this country, she, with his consent, and through an agent, sold the house for \$1000, which sum was also received by him. That there was no marriage contract between herself and her husband. That all the property thus inherited was paraphernal, and that by the laws of Spain, which govern in Campeachy, as well as by the laws of Louisiana, she is entitled to a legal mortgage on all the real property of her husband surrendered to his creditors. On the trial of this opposition the counsel for the opponent moved the court for a continuance, on the ground that she had previously obtained an order for a com-

mission to examine witnesses residing at Campeachy to prove the facts on which her claim was based, and that without this testimony she could not safely go to trial. The counsel for the syndics then admitted her right of mortgage for \$1000, but objected to the continuance being granted, on the grounds, that the testimony by which she expected to prove that the insolvent had received \$2800 from her mother's succession in 1822, before he took up his residence in Louisiana, was irrelevant, inasmuch as, under such proof, she would not be entitled to the mortgage she claims; and that there being no funds coming to the ordinary creditors, it was useless to wait for the return of the commission. The judge having sustained this objection, and refused the continuance, the opposing creditor took a bill of exceptions to his opinion, and afterwards appealed from the judgment allowing her claim only for \$1000.

Bodin, for the appellant. Where there is no marriage contract between the parties, the law of the matrimonial domicil has been held to control and govern the rights to property wherever situated. At least such is the opinion of many eminent jurists. Story's Conflict of Laws, § 152. Others have considered the law of the place where the marriage is celebrated, as being a *real* statute, the effect of which cannot be supposed to have been impliedly adopted by the contracting parties, but as to property within the territory where that law has any force. Consequently, as to immovables, the rights of the husband and wife are determined by the law of the *situs*. *Saul v. His Creditors*, 5 Mart. N. S. 569.

Let us apply both doctrines to the present case, and examine the rights of the opponent on the supposition that no change of domicil had ever taken place.

She had a claim against her husband for \$2800, as a portion of her paraphernalia. The law of the matrimonial domicil gave her a tacit mortgage on the property of her husband, to guaranty the reimbursement of that claim. According to the system, which applies the law of the place where the marriage was celebrated to all property wherever situated, she could exercise an hypothecary right on property owned in Louisiana by her husband.

Adopting the contrary opinion, that the law of the matrimonial domicil shall only bind the parties, as far as that law extends, but

no farther, then by what shall we be governed? Surely by the *lex rei sitæ*, which provides that the wife shall have a general mortgage, for the restitution of the extradotal rights, on the immoveables of her husband.

Had Prats not changed his domicile, his wife could, under either doctrine, recover against his creditors here, with mortgage and privilege.

Can a change of domicile from Campeachy to New Orleans diminish her rights?

L. Janin, contra. This case presents the question, whether the opponent has a tacit mortgage for her paraphernal rights on property received by the husband before they became inhabitants of Louisiana, and whether this mortgage can be enforced to the prejudice of the creditors by judicial mortgage? The Spanish law is not applicable to this case. By the law of Louisiana the opponent can claim no preference and mortgage on property in this State.

The laws which give a mortgage to the wife on the property of her husband, are real statutes. "Real statutes are those which have principally for their object property, and which do not speak of persons, except in relation to property." Story, *Confl. of Laws*, p. 12, § 13. It was decided in *Saul v. His Creditors*, 5 Mart. N. S., 606, that the law of the Fuero, giving to the wife one-half of the community, was a real statute, because it relates more to things than to persons. Rodenburg, cited by Judge Story, p. 268, § 322, speaks expressly of the case of the wife's mortgage, and says "that it does not extend to the property of the husband situated in a foreign country, because the statute is real and cannot have an extra-territorial authority. *Consequenter non tacita seu legalis hypotheca adstringit bona alia, quam quibus lex poterit imperare; ea nimirum, quæ legislatoris territorio sunt supposita, cujus solius loci legis est, tanquam statuti realis, realem in rebus effectum producere, cum alterius judicis auctoritas non efficiat hypothecam.*" Hertius says that in matters of preferences and privileges of creditors, "if the controversy respects immoveables, the law of the country of the *situs rei* is, without doubt, to govern." Story, p. 270, § 325, 326. Elsewhere Rodenburg says, "what does not arise from the act of man, but simply from the authority of the law, of which sort all privileges of preference among creditors are, it should be

said, that the authority of the legislator has no effect upon property not subjected to him, when the controversy respects the interest of third persons, or of other creditors, who have not contracted in that place, and who consequently have submitted themselves to the laws of that place." Story, p 270, § 325. f. 'The numerous and long extracts collected in Story's second edition (p. 270), referring to the same subject, show an unusual unanimity among the civilians, and perfect harmony between the civil and the common law on this elementary question.

But no where is the necessity of confining the operations of real statutes, affecting the property of husband and wife, to the territory of the legislator, more convincingly shown than in the decision of this court in the case of *Saul v. His Creditors*. In that case it was contended, that the husband and wife must be supposed to have tacitly embodied the law of the place where they contracted marriage with their implied contract, and that it must, therefore, be presumed that they intended to be governed by this law, wherever they went to reside. But the court said that, granting the premises, the consequence would not follow, as far as regards the real property acquired by the parties out of the place where they were married. These laws are real statutes. The implied agreement, to consider them as part of the marriage contract, can not have a more extensive operation than the law itself. As real statutes they have no effect beyond the State where they were passed. The consent of parties cannot change them into personal statutes, and give them an ubiquitous operation. These statutes do not purport to regulate the property which the parties may acquire in another country. Their insertion in the contract would be nothing more than a declaration, that while *residing within that State*, their property should be governed by them. 5 Mart. N. S. 603, 604, 605.

In an analogous manner it is contended by the opponent in this case, that when Prats and the opponent were married in Yucatan, they must be understood to have tacitly agreed, that the paraphernal rights of the latter should be secured by a legal mortgage on her husoand's real estate, wherever he might acquire any, and to whatever country he might remove. This pretension is refuted by the reasoning employed by this court in *Saul v. His Creditors*.

A familiar case will show how unfounded such pretensions are. If they could be admitted, real estate in Louisiana, acquired by persons residing in Great Britain or the northern States, would be subject to rights of dower and courtesy. But such claims have never yet been set up. As foreign laws, and the rights claimed under them, are not binding, *proprio vigore*, beyond their natural territory, they must be enforced or disregarded according to the sound discretion of the court, and from considerations of public convenience. Story, Conflict of Laws, p. 203, § 244, says:

"But there is an exception to the rule, as to the universal validity of contracts, which is, that no nation is bound to recognize or enforce any contracts, which are injurious to its own interest, or to those of its own subjects. Huberus has expressed it in the following terms: *Quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur*; and Mr. Justice Martin still more clearly, in saying, that the exception applies to cases in which the contract is immoral or unjust, or in which the enforcing it in a State would be injurious to the rights, the interest, or the convenience of such State or its citizens."

The controversy must, therefore, be settled by the law of this State. This law gives a mortgage to the creditors who have recorded their judgments. It also gives a tacit mortgage to the wife to secure her dotal and paraphernal rights; but that mortgage, so far at least as it is tacit and exists without recording, must be confined to persons who contract marriage in this State, or who come to reside here. The mortgage exists only as an accessory to a principal contract. The law of Louisiana provides only for Louisiana contracts. When the marriage is contracted here, the parties are properly forming a Louisiana contract. When, after marriage, they remove to Louisiana, they voluntarily subject themselves to the laws of Louisiana; but in this case, it is only for acts posterior to their removal, that they can claim to be governed by our laws. But until their removal to Louisiana, the relations which spring from their marriage are foreign contracts, which must be determined by the foreign law; and it has been shown that when that is a real statute, it cannot be permitted to take effect in Louisiana. Let us suppose that the opponent had come from a country which did not recognize tacit mortgages. She

could certainly not claim a mortgage, after her arrival, for the reimbursement of property which her husband had received before it. This would be an attempt to give an *ex post facto* effect to the law. And although the law of Mexico grants a tacit mortgage to the wife, the case is not different, when, as has been shown, the benefits of that law do not follow the opponent beyond the limits of Mexico.

If this suit presented a question of conflict between a domestic and a foreign law, we should confidently rely upon the familiar principle, that "there can be no pretence to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, where those laws are deemed oppressive and injurious to the rights or interests of the inhabitants of the latter. Story, pp. 32, 37, 271.

The inconveniences of tacit mortgages are daily felt. They would be intolerable, if they resulted from facts anterior to the arrival of a foreign husband or tutor. When the debtor resides in this State, at the time of subjecting himself to a tacit mortgage, it is, generally, possible to ascertain, with more or less accuracy, the danger which threatens persons contracting with him. But if he should be suffered to arrive here with a tacit mortgage infecting every piece of real property he may touch, our citizens would be exposed to constant and unavoidable deception.

MORPHY, J. This case presents a question which is by no means free from difficulty and doubt, and which has been the subject of learned discussion and great diversity of opinion among the most eminent jurists of France. We have to determine, whether there exists a legal mortgage in favor of foreign minors and married women, on the immoveable property belonging to their tutors or husbands situated in Louisiana.

It is admitted that, by the Spanish law, which was in force in Campeachy in 1822, the restitution of the wife's paraphernal property is secured by a tacit mortgage on the real estate of her husband. As it seems to be conceded, on all hands, that this controversy must be decided by the laws of Louisiana, where the property to be distributed is situated, it appears to us quite immaterial to know or inquire what the law of Mexico provides on this subject.

The counsel for the appellant relies on article 2367 of the Civil Code, which gives a legal mortgage on the property of the husband for the reimbursement of the paraphernal rights of the wife. This provision, he says, is general, and was never intended to be restricted to any particular class or category of married women; that this legal mortgage must, therefore, enure to the benefit of every married woman, wherever her marriage may have been celebrated, and at whatever time or place the property, the reimbursement of which is claimed, may have been received. In support of this position, he has referred to Troplong, vol 2, Nos. 429, and 513 *ter*, of his treatise *Des Privilèges et Hypothèques*. This distinguished writer, proceeding upon the principle that the law which in France subjects the property of tutors and husbands to a tacit mortgage is a *real statute* (*statut réel*), holds, as a necessary consequence, that foreign minors and married women have a legal mortgage on the property of their tutors and husbands situated in that country, because, says he, the peculiar character and true effect of a *real statute* is to operate upon and regulate immoveable property, without reference to the persons owning the same. Merlin, *verbo*, Remploi, T. 17, seems to hold the same doctrine, while Duranton and Grenier, authors equally respectable, maintain the opinion that foreign minors and married women have no legal mortgage on the property of their tutors and husbands in France. 19 Duranton, 418. 1 Grenier, *Des Hyp.* § 284.

It is true that the main reason given by these last mentioned jurists in support of their opinion, can have no weight or application with us. They say that the mortgage is an institution of the civil law, and that by articles 8 and 11 of the French Code, a foreigner is not entitled to the enjoyment of civil rights in France, except so far as they are secured to Frenchmen in the country to which such foreigner belongs; and that no contracts passed in a foreign country can create a mortgage on property in France, unless there be some provision to that effect in the political laws or public treaties. Art. 2128. According to these writers, no legal mortgage would result from a marriage between two foreigners, even if celebrated in France, the legal mortgage being a civil right given to Frenchmen only. No such restrictions are known to our laws, which place our citizens and foreigners on the same

footing as to the enjoyment of civil rights and privileges ; and a marriage celebrated here between two foreigners, would produce the same legal effects as if it had taken place between two of our own citizens. But while we acknowledge this, we are by no means prepared to adopt, without any limitation, the doctrine held by the learned Troplong. The very principle upon which he builds it may, perhaps, be doubted. The legal mortgage in favor of minors and married women, is not created for the preservation of the property it affects, but for the security of a personal action of which it is an accessory. The main object of such a law is the protection of these persons, not the regulation or preservation of the property itself. But, be this as it may, the consequences to which such a doctrine must lead in a country like this, are too injurious to the rights, the interests, and the convenience of our citizens, to be for a moment tolerated, unless such consequences be forced upon us by some stern and unbending provision of law. It is well known that a large amount of property is held in Louisiana by non-residents, who have never come to this country, or who have left it never, perhaps, to return. Such property, under the doctrine contended for, would be subject to the tacit mortgages of the wives which such non-residents may have successively had, or of the minors to whom they may have been appointed tutors, in the countries where they reside. How extremely difficult, if not impossible it would be, for our citizens to ascertain those secret rights or incumbrances, or even the very facts which give rise to them ? The inconveniences resulting from tacit mortgages in this State, are daily and deeply felt, notwithstanding the precautions taken by law to lessen the difficulty and danger attending them. The evil would become intolerable, and our citizens be exposed to constant and unavoidable deception, if these hidden liens could exist without even the slight protection afforded by these precautions, which, from their nature, can apply only to the inhabitants of the State. After an attentive examination of the provisions of our Code which establish mortgages in favor of minors and married women, we have come to the conclusion, that such mortgages, at least so far as they are tacit and exist without being recorded, were intended to be confined to persons who marry in this State, or receive their appointments as tutors

from our courts, or who, after marrying or receiving such appointments abroad, come to reside here; and that, in the latter case, such tacit mortgages exist only for sums received since their removal into this State. Article 3299, which immediately follows the one providing that these mortgages shall exist without being recorded, enacts, that "the tutors and curators of minors, interdicted, and absent persons, as well as husbands, are bound to render public the legal mortgages with which their property is burthened, and, for this purpose, to require that the acts on which these mortgages are founded, shall be recorded without delay in the office provided for that purpose." The following article, 3300, provides, that "husbands and tutors who have neglected to cause to be made the recording directed in the preceding article, and shall have granted or allowed to be taken any privilege or mortgage on their immoveables and slaves, without expressly declaring that their property was subjected to the legal mortgage of their wives, or of the persons above mentioned whose property they are administering, shall be considered guilty of fraud, and shall pay to the party suffering by it such damages as the nature of the case may require."

Article 3304 further enacts, that "in case of neglect on the part of husbands, tutors, subrogated tutors, and curators, in causing to be made the recording ordained by the preceding articles, it may be demanded by the relations of the husband or of the wife, and by the relations of the minor, interdicted, or absent persons, or in default of relations, by their friends. It may even be demanded by minors or married women without any need, on the part of the latter, of authority from husbands or judges."

These, and other provisions of the Code on the same subject, clearly apply only to persons residing in the State. They repel the idea that the law-giver ever intended to extend the same extreme favor to non-resident wives and minors, whose rights would forever remain a mystery to our citizens. The removal of the opponent, with her husband, into this State, placed her under the protection of our laws for the future. It entitles her to a tacit mortgage, for all moneys he may have since received for her account; but to extend back this mortgage so as to cover funds received by the insolvent in 1822, while he resided in Campeachy,

would be to declare, at once, that a tacit mortgage exists, even though the husband, the wife, the tutor, or the ward, never were in Louisiana. Such a mortgage we cannot recognize, nor do we believe it was ever contemplated by our laws. We, therefore, conclude, that the judge correctly overruled the motion for a continuance, on the ground that the evidence sought to be obtained was irrelevant, inasmuch as it would not have entitled the appellant to the mortgage claimed.

Judgment affirmed.

JAMES QUINE v. WILLIAM T. MAYES.

The execution of an attachment bond, is no waiver of the party's right to show that the facts on which the attachment was obtained are unfounded, or that the property attached does not belong to the defendant.

The sureties on a bond given for the release of property attached, the condition of which is that they shall satisfy whatever judgment may be rendered in the suit, though not parties to the action, may plead the nullity of the judgment, when called upon to satisfy it. Their undertaking was, to satisfy any judgment legally obtained. When a judgment is absolutely null, any one having the least interest in opposing its effect, may have such nullity pronounced.

APPEAL from the City Court of New Orleans, Cooley, J.

MORPHY, J. Under a writ of attachment, the marshal of the City Court levied upon twenty-two bales of cotton as the property of the defendant. Two days after, Taylor, Gardiner & Co. of this city, bonded the cotton, and took it into their possession. An attorney having been appointed to represent the absent defendant, a judgment was obtained in the suit; whereupon the plaintiff ruled Taylor, Gardiner & Co., and John Minturn, their surety on the bond, to show cause why they should not be decreed, *in solido*, to pay the amount of the judgment and costs. In answer to this rule, they denied being liable in any amount to the plaintiff, and averred that the firm of Taylor, Gardiner & Co. had no property belonging to the defendant in their possession or under their control, at, since, or previous to the levying of the attachment, but that, on the contrary, the twenty-two bales of cotton seized in this suit

were at the time, not the property of the defendant, but of John L. Wall, residing at Fort Adams, Mississippi, who had shipped and consigned the same to them. The rule having been made absolute, the respondents have appealed.

Maybin, for the appellants. The execution of the bond, was no waiver of the right to show that the property attached did not belong to the defendant. 13 La. 465. 14 Ib. 82. 17 Ib. 34. The bond takes the place of the property. 18 La. 58. An attaching creditor has no greater rights than his debtor. 8 Mart. N. S. 337. 13 La. 570. 15 Ib. 461. The evidence proves conclusively, that the property attached did not belong to the defendant. The judgment should be for the defendants in the rule.

Eggleston, contra, contended that the judgment of the lower court should be affirmed.

MORPHY, J. The testimony offered on the trial of the rule, places it beyond all doubt, that the cotton attached did not belong to the defendant Mayes, but to J. L. Wall, as alleged in the answer of Taylor, Gardiner & Co.; hence, they contend that the judgment which they are called upon to pay is a nullity, as the defendant was never legally in court by citation, or by the process of attachment, which, in regard to persons residing out of the State, stands in place of citation. The judge was of opinion that, as the testimony shows that at the time the appellants signed the bond to release the cotton, they were fully aware that it did not belong to Mayes, and that as they, nevertheless, bound themselves to satisfy any judgment which might be rendered in the suit, they cannot be listened to when they urge this circumstance to relieve themselves from their deliberate and absolute engagement; that if there be any nullity in the judgment, resulting from the fact that no property of the defendant was attached, it is a relative, not an absolute nullity; and that third persons have no right to set it up as a basis of defence against their obligations arising collaterally. We think otherwise. The very knowledge which Taylor, Gardiner & Co. had, of the defendant's want of property in the cotton, induced them, probably, to bond it. In doing so, their object was no doubt to protect and secure the property of J. L. Wall, who had shipped it to them. They were aware that they could, without danger, sign a bond to satisfy any judgment to be rendered against Mayes, as

they knew that no valid one could be given in the suit, the property attached not being his, and the court being, therefore, without jurisdiction. It has been frequently held, that the giving of a bond is no waiver of a party's right to show that the facts on which an attachment has been obtained are unfounded, or that the property attached does not belong to the defendant. 3 Mart. N. S. 324. 14 La. 82. 17 Ib. 34. The only question, then, is, whether the appellants, who were not parties to the suit, can plead the nullity of the judgment, which they are called upon to satisfy under their bond? The Code of Practice, article 571, gives the right of appeal, not only to those who were parties to a suit, but also to third parties, when they have an interest in the judgment, and believe themselves aggrieved by it. If such a right exists, when the object is only to show error in a judgment regularly rendered, it appears to us that a person who is to be affected by a judgment, and against whom it is set up, should, *a fortiori*, have the right of showing that it is no judgment at all. The undertaking of the appellants was, to satisfy any judgment legally obtained in the suit, not one which has no legal existence and is absolutely void. In the case of *Bernard v. Vignaud*, 1 Mart. N. S. p. 9, which was a suit against a third possessor, this court said: "a judgment rendered against a person, without citing him in the ordinary manner, without his appearing, or any thing deemed by law equivalent to citation or appearance, is utterly void, and imports such nullity, that any one, the least interested in opposing its effect, may have such nullity pronounced."

It is, therefore ordered, that the judgment of the City Court be reversed, and that ours be for the defendants in the rule, with costs in both courts.

ANTOINE JONAU v. MARIE LOUISE HERMINA BLANCHARD and
others.

Where a name has been used by a partnership for the purpose of a fictitious credit, with the consent of the partner *in commendam*, the latter cannot avail himself of the provisions of art. 2821 of the Civil Code, to withdraw the amount advanced by him, or to free himself from responsibility, either towards his partner or third persons.

The father and natural tutor having advanced the capital for a minor child, not yet emancipated, constituted her, by notarial act, a partner *in commendam*. *Held*, that the authorization to enter into the partnership, having been given by notarial act, was equivalent to an emancipation; that the father clearly intended to give her the necessary authorization to enter into the partnership; and that whatever words may be used, effect will be given to the intention of the father, if expressed in an act clothed with the necessary solemnities.

An emancipated minor may engage in trade, and he will be bound by his commercial engagements as a person of full age. C. C. 379, 1867, 2222. He may form a general partnership, as well as one *in commendam*.

The ratification by a husband of a contract of partnership entered into by his wife, an unemancipated minor, before marriage, will be binding on the latter, he being by law the administrator of her dower. C. C. 2327, 2329, 2330, 2334.

The dissolution of a partnership is not an act of administration, and, therefore, requires a special power. It does not come within the general powers of an agent. C. C. 2966.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

L. Janin, for the plaintiff.

L. C. Duncan, for the appellants.

MORPHY, J. The petition sets forth that, in June, 1834, the plaintiff entered into a commercial partnership with Auguste Metoyer and Emilien Larrieu, to carry on a commission business in this city, under the firm of Jonau, Metoyer & Co. That the partnership having been dissolved, by consent of all parties, the plaintiff was authorized to continue the business for his own account, and to use the name of the old firm of Jonau, Metoyer & Co. That on the 24th of May, 1838, the plaintiff, by notarial act, formed a partnership *in commendam* with Marie Louise Hermina Benoist, then a minor, represented by Nicolas Benoist, her father and natural tutor, in which the plaintiff was to be the general partner, and the said Hermina Benoist the partner *in commendam*, and that the business was to be conducted under the firm of Jonau, Metoyer & Co. That the capital was to be formed with eight

thousand dollars to be furnished by the plaintiff, and ten thousand by Hermina Benoist, and the partnership was declared to have commenced on the 1st of April, 1838, and was stipulated to last until the 1st of April, 1840. That although it was stated in the notarial act that the sum of ten thousand dollars had been paid in cash by Hermina Benoist, the money was not so paid, but that two mortgage notes of \$10,000 each, drawn by Thayer and Hooker, to the order of, and endorsed by Twitchell, and belonging to Nicolas Benoist, were placed in the hands of the plaintiff, on the pledge of which his own note for \$10,000, was discounted by the Merchants' Bank, and netted \$9346 67. That in February, 1839, Thayer and Hooker paid on account of the notes \$5000, which were applied to the partial payment of the note of Jonau, Metoyer & Co.; and that for the balance of \$5000, the plaintiff gave a new note payable one year after date. That one of the two notes of Thayer and Hooker was then returned to Benoist, the other still remaining pledged to the Bank, after having been renewed. That in January, 1839, Marie L. H. Benoist intermarried with Albert Gallatin Blanchard, and, in her marriage contract, which was made with the consent and assistance of Nicolas Benoist, her father, she constituted to herself in dower the ten thousand dollars supposed to have been brought into the house of Jonau, Metoyer & Co., and agreed that the sum should be withdrawn as soon as possible from the said commercial house, and employed in the purchase of immoveable property, under the direction and advice of Nicolas Benoist. That on the 29th of April, 1839, A. G. Blanchard entered into an agreement, under private signature, in which he ratified and confirmed the partnership, formed by his wife prior to her marriage. That shortly after, in May, 1839, private business compelled the plaintiff to go to Europe, previous to which he gave a power of attorney to Charles Martinez, for the transaction of his private and individual business here; leaving the administration of the affairs of his commercial house to Emilien Larrieu, who had a power of attorney to that effect, under which he acted, to the knowledge of Benoist and Blanchard.

The petition further represents that from the time of the formation of the partnership, Nicolas Benoist had access to the partnership books, consulted them frequently, and offered and gave his

aid in the business of the firm. That on the 24th of April, 1839, Auguste Metoyer, who was indebted to the plaintiff, agreed to give, and did give, with the consent of the plaintiff and of Nicolas Benoist, in liquidation of a part of his debt, four drafts drawn by him on the house of Jonau, Metoyer & Co. to the order of Nicolas Benoist, and payable one year after their date, amounting together to the sum of \$11,300. That N. Benoist permitted the use of his name as endorser, apparently with a view to facilitate the discounting of these drafts, and to assist the firm in its business. That after the plaintiff's departure, N. Benoist, for the purpose of rendering more easy the negotiation of these notes, and of securing himself still better, advised that their payment should be secured by a mortgage, which was accordingly executed by Charles Martinez, as attorney in fact of the plaintiff. That in the course of the arrangements, the drafts were confidingly allowed to go into the hands of Benoist at the notary's office, where they had been left to be paraphed. That Benoist no sooner had them in his possession, than he refused to surrender them, and, under various frivolous and unfounded pretences, claimed, together with the said A. G. Blanchard, the dissolution of the partnership *in commendam*, and the restitution of the sum of \$10,000 brought into the partnership, and insisted on retaining the acceptances in satisfaction of the claim. That Martinez, misled by Benoist, and ignorant of the plaintiff's rights, dissolved the partnership by a notarial act, passed on the 28th June, 1839, and abandoned to Blanchard the ownership of the four drafts, the excess of which, over \$10,000, was to be paid to the plaintiff. That the act of dissolution is null and void, Martinez having had no authority whatever to execute it, or to consent in any manner to the dissolution of the partnership. That in thus prevailing upon Martinez, through threats and misrepresentations, to consent to the dissolution of the partnership, Benoist and Blanchard had no good ground to require such dissolution, and were governed only by the belief that the sum of \$10,000 could be more advantageously employed. That the withdrawal of the sum of \$11,300 from the active means of the concern, during the present period of commercial embarrassments, and the sudden dissolution of the partnership demanded by Benoist and Blanchard, who were known to be well acquainted with all its

affairs, destroyed the credit of the plaintiff's house, brought it under protest, and deprived it of a considerable portion of its business, whereby the plaintiff has suffered damages to the amount of \$20,000. The petition concludes by praying, that the act of dissolution of the 28th of June, 1839, may be annulled; that the partnership may be declared to have been in existence until the 1st of April, 1840; that the four drafts may be ordered to be surrendered to the plaintiff by the defendants, and may be, in the mean time, sequestered in their hands; and that they be condemned to pay plaintiff \$20,000 damages. The defendants admit the act of partnership to have been passed as alleged in the petition, but aver that all the obligations therein imposed upon, or assumed by the partner *in commendam*, were faithfully performed by that partner; and that neither she, nor her tutor before her marriage, nor her husband after her marriage, did any act tending directly, or indirectly, to interfere with, or impair any of the clauses or conditions of the act of co-partnership. The defendants aver that the plaintiff did himself grossly impose upon the partner *in commendam* and the tutor, at the time the co-partnership was formed, in this, that one of the clauses and conditions of the act of co-partnership was in direct violation of the laws of the State, and intended to involve the partner *in commendam* in hopeless ruin. They deny that in their conduct or proceedings in the premises, they have caused the plaintiff any damage; and allege that, if he has suffered any, it must be imputed to his own mismanagement and bad faith. They aver that the four drafts in question were obtained by them in good faith, and were duly negotiated in the course of business, and are now beyond their control. That as relates to the dissolution of the partnership, they acted under a strong sense of duty, and with a belief that the interest of the partner *in commendam* imperiously required such dissolution, the plaintiff having left the country, and violated the obligations imposed upon him as a member of the firm, and there being danger of the partner *in commendam* being involved in a general partnership. There was a judgment below granting the several prayers of the petition, except as to the damages, which were not allowed. The defendants have appealed.

We think with the judge *a quo*, that the voluminous evidence

spread upon the record makes out the case as stated by the petitioner. But it is said that the clause in the act of partnership, which provided that the name of the former firm of Jonau, Metoyer & Co. should continue to be used, committed the partner *in commendam* to the extent of an ordinary partner, contrary to her intention, and that, therefore, she had a right to withdraw from it. Article 2820 of the Civil Code provides, it is true, that the use of a name calculated to give a fictitious credit to the partnership, if permitted by the partner *in commendam*, destroys the immunities of the latter, and subjects him to all the responsibilities of a general partner in the business for which he has made an advance. If such a name is used without the consent of the partner *in commendam*, he is authorized to withdraw the sum he has advanced, and, on giving notice in two of the newspapers, he can free himself from all responsibility, either to the partners or to third persons, from the time of such notice. Article 2821. But, from the very terms of this article, it is clear that when this is done, with the consent of the partner *in commendam*, she has no such right, and cannot complain of her own act; and in the present case, the contract of co-partnership expressly provides, that the business shall be conducted under the firm of Jonau, Metoyer & Co., with the consent of the latter, and the reason given for it is the good standing and credit which the firm had until then enjoyed. It has been denied that M. L. H. Benoist could give a valid consent to such a contract, because she was a minor when it was formed. The nullity of the act of partnership is not pleaded in the answer, which, on the contrary, fully admits its original validity, but avers that it should be dissolved at the instance of M. L. H. Benoist, on account of the clause relative to the use of the name of Jonau, Metoyer & Co. It is by no means clear that the contract of partnership was originally invalid. N. Benoist, the father and tutor of Maria Louise Hermína Benoist, who might have emancipated her by a notarial act, did by such an act form for her this partnership. He thereby clearly intended to give her the necessary authorization to enter into a partnership. This authorization was equivalent to an emancipation. Whatever words he may have used, effect must be given to his intention, if expressed, as in this case, in an act clothed with the necessary solemnities.

Civ. Code, art. 369. An emancipated minor may engage in trade, and is then no more relieved against his commercial engagements than a person of full age. Civ. Code, arts. 379, 1867, 2222. 5 Mart. N. S. 654. If, then, the partnership between Jonau and M. L. H. Benoist be valid, the clause in question is valid also, because an emancipated minor who engages in trade may form a general partnership as well as one *in commendam*. But should the partnership be considered as having been originally void or voidable, it has been fully ratified by the marriage contract in which it is recognized, and by which the funds invested in it are constituted a part of M. L. H. Benoist's dower; and since the marriage, A. G. Blanchard, the husband, has further and fully ratified the contract, by entering into a written agreement with Jonau in relation to it, specially referring to the clause authorizing the use of the name of Jonau, Metoyer & Co., and this but a very few days before Jonau's departure for France. This ratification is binding on his wife, he being by law the administrator of the dower. Civ. Code, arts. 2327, 2329, 2330, 2334. But, moreover, as was correctly remarked by the judge below, the notes by means of which M. L. H. Benoist's contribution to the funds of the partnership was made, had been given to her by her father for this purpose, she having no fortune of her own. The notes were a donation made to her by N. Benoist, and in making this donation he had the right to attach to it the condition, that these notes should be her contribution to a partnership which promised at that time to be profitable.

As to the power of attorney under which the act of dissolution of this partnership was executed, it was clearly insufficient. It did not relate to the partnership business, nor is the partnership even alluded to or mentioned in it. Martinez is therein made the general agent of the plaintiff to attend to his private affairs during his temporary absence, and Larrieu, the first clerk of the house, had a power of attorney, under which he conducted the commercial business of the firm. The dissolution of a partnership cannot be viewed as an act of administration, and, therefore, required a special power. It does not come within the general powers of an agent. Civ. Code, art. 2966. Story on Agency, 20, 21.

It has been said that the plaintiff himself advertised the dissolution of the partnership with M. L. H. Benoist, in November,

1839, and cannot, therefore, pray that it be declared to have continued until the 1st of April, 1840, This is a mistake. The notice extracted from the newspapers, refers only to the old firm. It is signed by Jonau, by Metoyer, and by Larrieu, the members of that firm. Not a word is said in it of M. L. H. Benoist, or of the partnership *in commendam*.

From the testimony before us we cannot but consider the dissolution of the partnership obtained from Martinez, as having been made with the sole view, on the part of Benoist and Blanchard, of withdrawing M. L. H. Blanchard's funds from the partnership, and not from any just cause of complaint against the plaintiff, or the fear of the consequences to be dreaded from the clause in relation to the use of the name of the old firm of Jonau, Metoyer & Co. In order to accomplish his purpose, Benoist advised Martinez to secure Metoyer's four drafts by a mortgage on property belonging to the plaintiff, for the purpose of raising money on them for the use of the firm. The drafts thus secured having been delivered to him, on his promise to have them discounted, he retained them, and then called upon Martinez, in writing, for a dissolution of the partnership, which he succeeded in obtaining. This dissolution, and the circumstances under which the possession of these drafts was obtained, have surely not divested Jonau of his property in them; and the judge properly decreed the defendants to surrender them to the plaintiff, or to pay their amount.

Judgment affirmed.

ANTOINE JONAU v. THOMAS FELLOWS and others.

APPEAL from the District Court of the First District, *Buchanan, J.*

L. Janin, for the plaintiff.

L. C. Duncan, for the appellant.

MORPHY, J. This case is intimately connected with, and grows out of that just decided between the same plaintiff and M. L. H.

Blanchard, A. G. Blanchard, and N. Benoist, on an appeal from the Parish Court. They have been tried together, and, by an agreement of record, the whole transcript of that suit is to be used in this, so far as Benoist and Blanchard are concerned. Thomas Fellows, one of the defendants, having obtained an order of seizure and sale on the four drafts of Auguste Metoyer, accepted by the house of Jonau, Metoyer & Co., and secured by mortgage on property belonging to plaintiff, the latter sued out an injunction to arrest the execution of the same. After setting forth all the circumstances under which the mortgage was executed, and the possession of these drafts obtained by N. Benoist and Blanchard, the petition avers that Thomas Fellows is and was always informed of the circumstances, and that he is not the *bona fide* holder of the drafts, but that, on the contrary, he has combined and confederated with Benoist and Blanchard for the purpose of oppressing the plaintiff, and depriving him of the possession and use of the drafts, which are, and always have been his property. That so far as Fellows is concerned, he holds these drafts under the control and for the account of Benoist and Blanchard, no *bona fide* transfer of them having ever been made to him. That by their vexatious, harassing, and fraudulent attempt to procure Fellows to sue the plaintiff, as he has done, Benoist and Blanchard have greatly injured him in his commercial and private business, and have caused him damage to the amount of \$5000; and that Fellows, by combining with them and knowingly lending himself to their oppressive and fraudulent proceedings, has rendered himself liable, jointly and severally with them, in the same amount of damages to the plaintiff. The petition concludes with praying for the damages aforesaid, the sequestration of the drafts sued upon, and the restoration of them to the petitioner, the rightful owner of the same. Thomas Fellows answered separately, denying all the allegations tending to render him liable in damages to the petitioner, and averring that he is the *bona fide* owner of the drafts described in the plaintiff's petition, and hath paid therefor a good and valuable consideration. He prays for the dissolution of the injunction, with such general damages as are allowed by law, and special damages in the sum of \$500. Benoist and Blanchard pleaded the general issue. There was a judgment below making

the injunction perpetual, and decreeing the restoration of the drafts to the plaintiff as his property, with costs, and reserving the rights of Fellows against Benoist, if any he has. Fellows has appealed.

The evidence shows that nearly three months before the maturity of the drafts sued upon, the plaintiff had an advertisement inserted in three of the newspapers published in this city, cautioning the public against negotiating them, and that this notice appeared four times, (twice a week,) in both languages. Gourdain, a witness for the plaintiff, testified, that Benoist proposed to him to sue Jonau in his (witness') name on the four drafts in question, telling him that, if he took them, he must make oath that he received them before seeing the advertisement in the papers, which he then exhibited to witness, who recollected having seen it before; that he refused to do this. That Benoist made him several propositions in case the money was recovered of Jonau, and among others, that he would leave the money in witness' hands for one or two years without interest; that after the case of *Jonau v. Blanchard and others* was decided in the Parish Court, witness informed Jonau of the foregoing facts, thinking that the matter was finally settled. That the above proposition was made to him several times during three or four days. Witness does not remember that Benoist ever told him that the drafts belonged to him, but he said he could find others who would take them, but that they did not offer sufficient security. That Benoist, at that time, told him how he obtained the drafts, but that he (witness) does not recollect what he said about them. That since the institution of this suit, witness was notified by Benoist to take care not to perjure himself, for if he did he would bring him before the Criminal Court; to which the witness replied, that he would be careful to tell nothing but the truth, and that, had he not believed the affair settled, he would not have said a word to Jonau.

Benit, another witness, declares, that Benoist sent for him and his partner, Gourdain, who are commission merchants, stating that he wished particularly to see them both. They went to his house. Benoist proposed to them to take the drafts for collection, at the same time showing them the notice in the newspapers. Witness told Benoist that he could understand nothing about this

business, and asked him why he did not sue himself on the drafts. Benoist answered that he feared difficulties. That he could not recover the money, but that a third person might. Witness remarked to Benoist that he could not take charge of the matter, as the public well knew that his house was not able to discount such an amount. Benoist answered that witness was a *novice*, and that the public had nothing to do with a knowledge of his affairs, at the same time saying, that, in case he took the drafts, he should say that he had taken them long before seeing the notice in the papers. That the conditions proposed were, that a part of the money, when collected, should remain in the hands of his firm. That Benoist told him that Fellows would be charged with the recovery of a portion of the drafts, and witness' house with the balance, &c. With such evidence in the case, Fellows has not thought proper to show the good and valuable consideration which his answer avers that he paid for these drafts, amounting to \$11,300. He has not even attempted to show, that, in the spring of 1840, he possessed means adequate to such a discount, and the evidence adduced by the plaintiff renders it extremely improbable that he had. It is shown that, although he did some business as an exchange broker, there were several judgments against him for small amounts, which he was unable to satisfy. He declared on several occasions that he had no money, and that whatever property he had was so embarrassed with mortgages, that his judgment creditors could make nothing out of it. The improbability that he really discounted, *bona fide*, these drafts, is not a little strengthened by the circumstance, that he did not, according to the usual course of business in this city, deposit them for collection in one of the Banks, but carefully concealed his possession of them until the very day of their maturity, when they were handed to a notary to be protested, in case the acceptors failed to pay on demand. Upon the whole, we have come to the same conclusion as the judge below, that the real holder of the drafts sued upon was Nicholas Benoist, and that the name of Fellows was used, with his consent, for the purpose of enforcing payment out of the property of Jonau. As it has been decided by the judgment of the Parish Court, this day affirmed, that the drafts in question were held by Benoist and Blanchard tortiously, and without considera-

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tion, and that they were the property of Jonau, the judge correctly decreed them to be delivered up to the latter.

Judgment affirmed.

CHARLES TIERNAN and others v. JOHN MARTIN and others.

A stipulation that a certain sum shall be paid to a third person, towards the extinguishment of a debt due to him from one of the parties to the contract, is not a *stipulation pour autrui*. It is for the exclusive benefit of the stipulating party.

A fixed price is one of the legal requisites of a contract of sale; and though it be agreed that the price shall be fixed by a third person, if it become impossible, or be not done, the contract will remain imperfect.

APPEAL from the Commercial Court of New Orleans, *Watts, J. G. Strawbridge*, for the appellants.

C. M. Jones, contra.

SIMON, J. The object of this suit is the recovery of the sum of \$5,200, which, it is alleged, the defendants assumed to pay to the plaintiffs, under the following circumstances. Moses Hall, being largely indebted to both parties, the defendants agreed with him, on the 17th of September, 1836, that, if he would execute to them a deed of trust on fifteen negroes, and convey to them a tract of land which was then encumbered with a deed of trust in favor of the plaintiffs, for which land a release from the trust was to be made by the plaintiffs, they would assume to pay to Tiernan, Cuddy & Co., the sum of \$5,200, on account of the debt due to them by Moses Hall. It was further agreed between Hall and the defendants, and this is one of the stipulations contained in their written agreement, that the defendants were to allow Moses Hall, for the tract of land to be conveyed by him, *such price as it should be valued at by persons mutually chosen by them*, and that on the *plaintiffs releasing their deed of trust on the land*, the defendants were to settle with them the said sum of \$5,200. The plaintiffs were not parties to this agreement.

The evidence further shows, that, on the 23d of February, 1837,

W. M. Rives, who held the land in trust for the plaintiffs, executed a release of the deed of trust on the land ; that the same was sent to the plaintiffs for their approval and signature, but that the document was never signed by them. It appears, also, that Hall made a conveyance of the land to the defendants, which was duly recorded, but in that conveyance *the price is left blank*, as the property never was appraised according to the agreement, although the defendants had appointed their appraisers, and the conveyance never was accepted by Martin, Pleasants & Co. In the mean time, Moses Hall died utterly insolvent, and judgments having been obtained against him in his life time, since the year 1836, those judgments, by the laws of Mississippi, operated as a lien on the tract of land intended to be conveyed. It is further shown by the testimony of Rives, that, in contemplation of the full execution of the stipulations contained in the written agreement entered into between Hall and the defendants, Hall was credited or released by Tiernan, Cuddy & Co. for the sum of \$5,200, and was charged by the defendants for the same amount ; that in subsequent conversations with the witness Rives, who, in this transaction, had acted as the plaintiffs' agent, Martin, one of the defendants, often admitted the liability of his firm to the plaintiffs for the sum ; and that, on the 14th January, 1837, Hall delivered to Rives an order on the defendants for \$5,200, to be applied to the credit of Hall in his account with the plaintiffs ; which order or draft, not having been accepted by the defendants, is annexed to the plaintiffs' petition, and forms the basis of the present action.

With these facts before him, the inferior judge was of opinion that the plaintiffs were not entitled to recover, and gave judgment in favor of the defendants, from which the plaintiffs have appealed.

The plaintiffs' claim is resisted on two grounds: *First*, That the release from the deed of trust, alluded to in the written agreement between Hall and the defendants, never was executed and tendered, as contemplated by the agreement, and that this was a condition precedent.

Second, That the price of the tract of land to be conveyed by Hall to the defendants, never was fixed in the manner agreed upon between the parties.

Before examining the merits and effect of these two grounds of

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defence, it is proper to transcribe the clause of the agreement relied upon by the defendants. It is in these words: "Martin, Pleasants & Co. are to allow the said Moses Hall for the tract of land above mentioned *such price as it shall be valued at by persons mutually chosen by them, and on Tiernan, Cuddy & Co.'s releasing their deed of trust on the said land*, the said Martin, Pleasants & Co. are to settle with them the sum of \$5,200, part of the claim against the said Hall."

I. It is true that the release was not executed by the plaintiffs as contemplated by the written agreement, and that Rives, who acted as their agent, was, perhaps, without authority to give it. It is also true that the plaintiffs cannot recover without showing that this condition has been complied with, and that, accordingly, an effectual release from the trust has been made. But this would not be a bar to their ultimate recovery, as the plaintiffs, if nonsuited, would still be at liberty to execute a full and complete release of the trust title, so far as it affected the land which Hall was to convey to the defendants; and we agree with the judge *a quo* that, if, in other respects, the plaintiffs were entitled to recover, the judgment might be made conditional in this particular, on the plaintiffs supporting the costs of the suit incurred until the execution of the release.

II. The stipulation contained in the agreement under consideration is not properly a *stipulation pour autrui*, for it is for the exclusive benefit of Hall that the sum of money therein mentioned is assumed by the defendants to be paid to the plaintiffs. The object of the assumption is to pay Hall's debt, and it makes a part of the consideration, or price of the property, which he was to convey to the defendants. On this subject, Pothier, Obligations, No 57, says: "*Ce n'est pas stipuler pour un autre, que de dire que la chose, ou la somme que je stipule, sera délivrée ou payée à un tiers désigné par la convention. Par exemple, si, par le contrat, je vous vends un tel héritage pour la somme de mille livres, que vous payerez à Pierre, je ne stipule point pour un autre; c'est pour moi, et non pour Pierre, que je stipule cette somme de mille livres. Pierre n'est dans la convention que comme une personne à qui je donne pouvoir de la recevoir pour moi et en mon nom.*" The plaintiffs, therefore, cannot pretend to have acquired greater

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rights than Hall himself had; and it is clear that the payment which was to be made to them in discharge of Hall's debt, was to depend on his strictly executing his obligation according to the terms of the contract.*

This principle being once recognized, let us inquire whether Hall could legally enforce the payment of the sum claimed by the plaintiffs, as part of the price of the property which he was to convey? It was agreed between the parties, that the defendants were to pay such price, as the property should be valued at by persons mutually chosen by them. This has never been done on the part of Hall; and although the vendees proceeded to appoint their appraisers, the contract was left imperfect and incomplete until the death of Hall in a state of utter insolvency. The price *was left blank*, as it had never been fixed or agreed upon, and, from the circumstances of the case, it appears that there is now an absolute impossibility of ever having the property valued as contemplated by the parties. At all events, if Hall himself were to demand the amount sued for, it is evident that this part of the appellees' defence would be effectual against him, and that he could not recover; and we cannot see any reason why the plaintiffs should stand in a better condition than their debtor, for the benefit of whom the assumption was made. It is one of the legal requisites for the perfection of a contract of sale, that there shall be a fixed price. Civ. Code, art. 2414. 1 La. 282. 3 Ib. 535. Pothier, Vente, Nos. 16 and 17. And although it may be agreed in the contract, that such price shall be fixed by the estimation of a third person, if this is not done, or it becomes impossible to do it, there is no price, and the contract remains imperfect. Pothier, Vente, Nos. 23 and 24. In this case, it has been shown that the agreement cannot be perfected, as originally contemplated between

* In a petition for a re-hearing, *G. Strawbridge*, for the plaintiffs, urged, that at the time when Pothier wrote, the law was different from what it is under our Code. By arts. 1883, 1896 of the Civil Code, it is provided that where a third person has consented to a stipulation, made in his favor, it cannot be revoked. That such was the law of this State even before the adoption of the present Code. 3 Mart. 206. 5 Ib. 321. 8 Ib. 60, 163. That in the case of *Sargeant v. Daunoy*, 14 La. 45, it was determined that, after a third person had become interested, the original parties could not change their contract, either by consent or neglect. *Re-hearing refused.*

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the parties, owing to Hall's death in insolvent circumstances, and to the fact of the creditors having, in the mean time, obtained judgments against him, which operate as a lien on the property; and we concur with the inferior judge in the opinion, that, there being no valid conveyance of the land to the defendants, the plaintiffs cannot be entitled to reap the fruits of Hall's imperfect contract and unexecuted obligation. Their claim must, therefore, be rejected.

With regard to the statement of the witness Rives, that Hall was credited by the plaintiffs, and *charged by the defendants* with the sum of \$5,200, it is contradicted by the positive testimony of Crook, who, having examined the defendants' books, proves that there is no item of this kind in the books. As to the admissions proven by Rives to have been made by the defendants, in subsequent conversations which they had with him, we must presume that they were made under the belief, or on the supposition that Hall would perfect his contract of sale. But, however it may be, we think that nothing but Hall's strict compliance with his obligation, can give the plaintiffs any right to recover.

Judgment affirmed.

THEODULE LAUVE v. HIS CREDITORS.

The vendor is entitled to be paid out of the proceeds of the thing sold, before other privileged claims, with the exception of charges for affixing seals, for making inventories, and others necessary to procure the sale of the things. C. C. 3234.

APPEAL from the Parish Court of New Orleans, Bermudez, J., presiding.

L. Janin, for the appellant.

D. Seghers, contra, cited, *Delor v. Montegut's Syndics*, 4 Mart. 468. *Goforth v. His Creditors*, Ib. 519. *Janin v. His Creditors*, 10 La. 554.

SIMON, J. This is an appeal from a judgment homologating a tableau of distribution amended by the inferior court. The judge *a quo*, says, in the judgment appealed from, that "the general

charges and privileges must be paid first out of the proceeds of the moveables, after deducting the special privilege of Benoist, and *the deficiency is to be paid by a contribution pro rata, on the proceeds of each separate piece of real property or slaves, and on the proceeds of the moveables subject to the special privilege of Benoist,*" &c. According to these principles, the First Municipality, having the vendor's privilege on certain real property, was placed on the tableau for the amount of the proceeds of the sale thereof, from which was deducted a contribution of nine and a quarter per cent on the amount, being the *pro rata* on such proceeds required to supply the deficiency in the funds necessary to pay the general charges and other special privileges. From this judgment thus amending the tableau filed by him, the syndic has appealed, and his complaint in this court is limited to the item concerning the claim of the First Municipality.

This case presents exactly the same question as one of those which were lately submitted to us, in the case of *Monrose v. His Creditors*, ante, p. 280, and in which we held, that according to art. 3234 of the Civil Code, the vendor was only bound to pay the commissions of the syndic who administered partly for his benefit, and such other charges as were necessary to affect the sale of the thing. Under this rule, the First Municipality was not bound to contribute *pro rata* to all the law charges, and other special privileges. Its contributions should have been limited to the charges specified in the article of the Code above referred to, which, in the present case, would consist in the proportion of the expenses of appraisal and public notices, the auctioneer's and syndic's commissions, charges for the auctioneer's stall, if paid by the syndic, and in the amount due to the surveyor, for his plat and services, if any such were made and rendered previous to the sale.

It is, therefore, ordered, that the judgment appealed from, so far as it relates to the contribution *pro rata* complained of by the First Municipality, be reversed; that the tableau of distribution homologated by the lower court be amended, so as to charge the said Municipality only with the amount which it is bound to support under the rule above recognized; that the case be remanded for the purpose only of ascertaining and liquidating the amount of costs and expenses which the appellant is bound to support, and

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the increase of the *pro rata* contribution which the other creditors will have to bear, in consequence of the change which this decree will necessarily occasion in the said contribution ; and that in all other respects, the judgment of the Parish Court be affirmed. The costs of the appeal to be borne by the appellees.

THE STATE v. THE NEW ORLEANS GAS LIGHT AND BANKING COMPANY.

The third section, of the act of 14th March, 1839, requiring the Banks in the city of New Orleans to settle, and pay in gold and silver, the balances due to each other, every Monday, imposed no duty not previously required by law ; and if the party in whose favor it was stipulated choose to waive the right, the State cannot complain, without showing some injury resulting therefrom to the community.

An act of incorporation may be forfeited by misuse or abuse. It is a tacit condition of such a grant, that the grantees shall act up to the end or design for which they were incorporated ; and where they do not, the rights and privileges granted may be withdrawn. But the misuse or abuse must be first judicially ascertained.

Banks, insurance, canal, bridge, and turnpike companies, the stock of which is owned by private individuals, are essentially private corporations.

The existing law of the State forms as much a part of the contract in every act of incorporation, so far as it is applicable, as it does of every contract between individuals.

The tenth title of the first book of the Civil Code relative to corporations, applies to every charter granted since its adoption, unless there be something in the latter repealing or suspending its provisions.

Since the act of 14th March, 1839, relieving the Banks of this State from the forfeiture of their charters, occasioned by their suspension of specie payments, no Bank can suspend specie payments, even for a day, without exposing its charter to forfeiture.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, Attorney General, for the State.

G. Strawbridge and *Grymes*, for the appellees.

GARLAND, J. The petition represents that, in the year 1835, the legislature incorporated the New Orleans Gas Light and Banking Company, with certain capital, rights, and privileges. That the charter was granted on the express and implied condition that the Company should at all times pay all its notes and liabilities in

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lawful money of the United States, and that if said Company should, at any time, suspend payment as aforesaid, for the space of ninety days, then the charter should be, *ipso facto*, forfeited. That said obligation not only results from the express provisions of the charter, but is implied by the nature of every bank charter granted by the legislature.

It is further alleged that the said corporation, in May, 1837, suspended the payment in specie of its notes and obligations, which was persisted in until the month of December, 1838. That in March, 1839, the legislature passed an act relieving the different Banks of the State from the forfeiture of their charters, incurred by that suspension. That in this law it was provided that all the Banks, the Gas Light Bank among others, should pay or settle every Monday morning in gold or silver, the balances that each might owe to the other Banks. That the Bank should publish, at least once a month, a statement of its condition, in some newspaper in the city of New Orleans, showing the amount of its circulation, deposits, specie in the vaults, and other assets and liabilities. That the remission of the forfeiture was granted, on the express condition, that the Bank should comply with these conditions, and should not in future suspend or refuse the payment in specie of any of its notes or obligations. The petition then alleges a violation of these obligations in not paying weekly the balances in gold or silver, in not publishing monthly statements, and in suspending payments on or about the 18th of October, 1839, whereby it is alleged that the charter is forfeited. A dissolution of the corporation is prayed for, and an order that the institution may be put in liquidation as required by law. The answer is a general denial.

By the twenty-fifth section of the charter, the Company is prohibited from suspending or refusing payment in lawful money of any of its notes, bills, obligations, or deposits; and if it shall at any time suspend or refuse payment as aforesaid, the holder of the bill, &c. is entitled to recover interest on said note or bill, at the rate of ten per centum per annum; and if said suspension or refusal shall continue for a period of ninety consecutive days, then the charter shall be, *ipso facto*, null and void. Session Acts of 1835, p. 104.

It is not denied that the Bank suspended specie payments in

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May, 1837, and resumed again in December, 1838. On the 14th of March, 1839, the legislature passed an act, the preamble to which recites that the Banks throughout the United States and this State had suspended specie payments in 1837, the result of a general derangement in the monetary system of the country, and that as the Banks in this state had resumed specie payment, this act provided, that such of the Banks as had forfeited their charters by a refusal to pay their notes and obligations in specie at any time prior to the passage of the act, should be reinstated in all the powers, rights, and privileges conferred upon them by their respective charters, notwithstanding any forfeiture already incurred, to the same extent as if no such forfeiture had ever existed, *provided* that this act shall not be so construed or understood as to authorize any future suspension by any of the Banks of the payment of their obligations in specie. Acts, 1839, p. 68, sec. 1. The third section of the same act makes it the duty of the Banks to pay their weekly balances in specie, and to publish monthly statements of their situation.

The evidence shows that the monthly statements have been regularly published. That since the 7th of January, 1840, no balances have been due to other Banks. Previous to that time, the balances were paid in currency satisfactory to the Bank or Banks, to which the balance was owing. Whenever the balances were demanded in specie, the Bank paid them in that medium. It did not refuse in any instance, but as often paid in specie paying notes as in specie. On the 19th of October, 1839, the Bank passed a resolution suspending payments in specie of its bills and obligations, which suspension continued until the 7th of January, 1840, when it again resumed, and has continued to pay in specie ever since. There is no evidence that, during this last suspension, any bill or note was presented for payment, and payment in specie refused.

The alleged ground of forfeiture, that the defendants have not published monthly statements of the condition of the institution, is not sustained by the testimony, the Cashier having proved that they were published as required.

The obligation to pay the weekly balances to other Banks in specie, is declaratory only. The act imposes no other duty than

was previously required by law ; and if the party in whose favor it was stipulated, choose to waive it, the State cannot complain, without showing that some injury has resulted therefrom to the community, whose guardian it is. This obligation will, however, be considered more appropriately under the third ground of alleged forfeiture.

Before proceeding to the consideration of the last ground of forfeiture, it may be proper to state that, it is now well settled, that an act of incorporation may be forfeited for a misuse or abuse of the powers entrusted to it. It is a tacit condition of a grant of incorporation, that the grantees shall act up to the end or design for which they were incorporated. If they do not, the rights and privileges granted may be withdrawn. Angel & Ames on Corporations, 510. 2 Term Rep. 515. 9 Cranch, 51. 4 Wheaton, 658, 659. 1 Blackstone, 485. 2 Kyd on Corp. 474. But this mis-user or non-user of its franchises, must be judicially ascertained. Chancellor Kent, in his Commentaries, vol. 2, p. 251, says, it is an old and well established principle of law, that a corporation is not deemed dissolved by reason of a mis-user or non-user of its franchises, until the default has been judicially ascertained and declared. In the case of *The King v. Amory*, 2 Term Rep. 515, the Court of King's Bench held the same doctrine. A Bank whose stock is owned by private individuals is essentially a private corporation, though its objects, uses and operations partake of a public nature ; and the same may be said of insurance, canal, bridge and turnpike companies. A right of property is, therefore, vested, of which these corporations should not be divested for light causes.

We also take it to be undeniable that, in every act of incorporation, the existing law of the State forms as much a part of the contract, so far as applicable to the corporation, as it does of a contract between individuals ; and we hold that the tenth title of the first book of the Civil Code in relation to corporations, is applicable to every charter made since its adoption, unless there be something in the latter showing a repeal or a suspension of its provisions. Article 438 of the Civil Code is in accordance with the established principles of both the Civil and Common Law, and shows that the legislature in some cases, and the judiciary in all others, have as

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much authority over corporations as over individuals, and can take from them their chartered rights if they abuse their privileges, or refuse to comply with the conditions on which such privileges were granted.

In this case the abuse complained of is, that the Company, for about eighty days, suspended or refused to pay its notes and liabilities in specie. We know of no greater abuse of privileges or neglect of duty than this, on the part of a banking corporation; and if there was no sufficient justification for it, in the circumstances of the case, we should not hesitate to pronounce it a sufficient ground of forfeiture. But it is earnestly contended in this case, that the Bank may suspend, at any time it pleases, for the space of ninety days, without incurring a forfeiture. We do not think so. Previous to the act of March 14th, 1839, there might have been much force in such an argument; but since the enactment of that law, none of the Banks in this State have a right to suspend specie payments for one day longer than the acts of the last legislature now authorize. The act of 1839 reinstated the Banks in all their rights and privileges, but, in doing so, the legislature said that it was not to be considered as authorizing any future suspension; and it is a great mistake to suppose that this Bank can, at any time it pleases, suspend the payment of its notes and obligations in specie, for a period not exceeding ninety days, upon the payment of ten per cent interest only.

Upon looking into the testimony in this case, we find, although it is stated that the Board of Directors passed a resolution on the 19th of October, 1839, to suspend specie payments, that there is no evidence of an actual refusal on the presentment of any of its notes or obligations for payment. An effort was made to prove that two or more notes or bonds given to the Bank of the United States were not paid at maturity. This appears to have been the case; but the Cashier of the Bank testifies that they never were presented for payment. It is not shown that any public inconvenience or injury has resulted from the passing of this resolution; and it may be, had the supposed inquiry been gone into, that the defendants could have shown some cause sufficient to excuse the adoption of such a resolution, or even a temporary suspension of

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specie payment, and that the penalty would be too great for the offence.

The judgment of the District Court is therefore annulled, and the case remanded to the District Court for a new trial. The costs of the appeal to be paid by the defendants.

JAMES S. DOUGHERTY and another v. SAMUEL JARVIS PETERS and others, Sureties of Hozey, late Sheriff.

The liability of a surety in an official bond, attaches from the moment the principal is in default.

The sureties in a sheriff's bond, are not entitled to notice of the default of their principal.

In an action against the sureties of a public officer to recover an amount due to the plaintiffs from the latter, judgment should be rendered for the sum actually due, and not for the whole penalty of the bond to be satisfied by the payment of the amount so due.

Where several courts have concurrent jurisdiction of actions against the sureties of a public officer, no one of them can condemn the sureties to bring into court the amount for which they may be ultimately responsible, and discharge them from further liability. The creditors cannot be compelled to come into that tribunal for redress. The judgment should be only, for the amount due to the plaintiff.

APPEAL from the Commercial Court of New Orleans, Watts, J.

BULLARD, J. The plaintiffs represent that they recently recovered a judgment against Charles F. Hozey, late Sheriff of the parish of Orleans, for the sum of \$4150, for money collected by him in his official capacity, arising from the sale of the steamboat Walker, sold by him as sheriff in virtue of a writ of *fi. fa.*, in a suit in which various persons intervened who are entitled to a part of the proceeds, to be divided in accordance with the judgment of the court rendered in said suit, all of whom, as well as the owners of the boat, so far as they have any interest, authorize the institution of this suit. That the same has never been paid, nor any part thereof, although required to be done by the judgment. They, therefore, bring this suit against the sureties of Hozey on his official bond, and pray that the latter may be condemned to pay, in proportion to their respective liabilities, the sum of \$4150, with interest

and costs, to be distributed in accordance with the judgment of the court previously rendered, and for general relief.

The defence embraces various questions of law which are raised in this, and numerous other cases against the same defendants, arising out of the defalcations of the late sheriff, which are now under advisement. The effect produced upon the liability of the defendants by the creation of the new office of sheriff of the Criminal Court, which was carved out of that held by Hozey during the period of the suretyship of the defendants, need not be considered in this case, because it is shown that the price of the steamboat Walker, sold by him in 1839, came into his hands at that time; and the act creating the office of sheriff of the Criminal Court was not passed until many months afterwards. The liability of the surety attached at the time the sheriff was in default.

The position that the defendants were discharged, because the plaintiff had not given the sureties due notice of the default, and had given the principal a prolongation of time, will not avail the defendants. This is not, in our opinion, one of the cases in which the surety is entitled to notice of the default of his principal; and we see no evidence of any prolongation of time which in law would operate the release of the defendants.

There is an exception, in the nature of a general demurrer, which we understand relates to the form of the action. It is that, on the face of the petition, the plaintiffs have no right in law to have or maintain their action.

By this, we suppose, it is meant that Dougherty & Co. are not entitled to recover the whole amount of the proceeds of the steamboat, and that, as to the other claimants for a part, the action is irregular.

We were at first disposed to consider the exception as well taken, and to restrict the right of the plaintiffs to recover, to that portion of the proceeds of the boat which it is shown was coming to them on the distribution. But the plaintiffs ask for judgment for the proceeds in accordance with the judgment against Hozey, and most, if not all, of the claimants consent to this proceeding. Now the judgment against Hozey was on a rule, taken by the plaintiffs in the case of *Dougherty & Co. v. The Steamer Walker and Owners*, on the sheriff, to show cause why he should not pay to the

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plaintiffs the amount of the judgment rendered in their favor out of the proceeds of the sale of the steamer. This rule was taken on the 10th December, 1839, and was afterwards made absolute, and the sheriff ordered to pay into court the amount of the proceeds of the steamer Walker, to wit, \$4150, to be distributed according to the judgment of distribution in the case. It is true, that Dougherty & Co. are entitled, on the distribution, to only a small portion of the money, but they ask for judgment for the whole amount to be distributed in accordance with the judgment of the court. In other words, we understand them as asking, that the sheriff's sureties may be condemned to do what he was bound to do by the judgment; that is to say, to bring into court the whole amount for which they are liable in this case, to be distributed by the court among the different claimants. To this extent, we see no solid objection to the form of proceeding. It avoids a multiplicity of suits, for small demands, and exposes the defendants to no risk of being condemned to pay any part a second time; because the parties, having consented to this proceeding, must be considered as having at least constituted the plaintiffs their agents for the purpose of compelling the sureties to bring the money into court, for distribution among all persons interested.

The Commercial Court gave judgment for sixty thousand dollars, that is to say, for the whole penalty of the bond, each surety being condemned to pay the whole of his share, but the judgment to be satisfied by paying to the plaintiffs the amount of \$4150 claimed by them, and the sureties being authorized to release themselves altogether from further liability, as sureties, by paying into the Commercial Court the sum for which each was bound, in all, sixty thousand dollars.

We are of opinion that the Court erred. In no event were the plaintiffs entitled to recover of the sureties more than they showed to be due by the late sheriff, and not the whole penalty of the bond.

The law gives to every person in relation to whom the sheriff was a defaulter an action upon the bond, but not a right to recover the whole penalty, and thus, by recording successive judgments as mortgages against the defendants, to make them appear as debtors, and their estates as encumbered to a much larger amount than in truth they are. In the nine cases which have been argued

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against Hozey's sureties, judgments have been recovered, and probably recorded, to the amount of upwards of five hundred thousand dollars, although under no circumstances could the sureties all together be liable to all the creditors of Hozey for more than sixty thousand. Nor can one court, of several having concurrent jurisdiction, condemn the sureties to bring into court the amount for which they may be ultimately responsible, and discharge them from further liability. The creditors cannot be compelled to come into one tribunal for redress; and if one of the courts of the first instance may render such judgment, the others may, and thus the sureties be compelled to pay at least three times the amount for which they bound themselves, with the right certainly of being refunded what might remain after paying all the creditors. We can see no good reason why the sureties should be adjudged to pay any thing more than the plaintiffs show to be due to them by the principal. The law has not provided for a *concurso* in a case like the present.

The judgment of the Commercial Court is, therefore, avoided and reversed; and it is further adjudged and decreed, that the defendants pay *in solido* into the Commercial Court the sum of four thousand one hundred and fifty dollars, with interest at five per cent from the 18th February, 1841, to be distributed among the different claimants according to the judgment already rendered in said case. The defendants to pay the costs of the court below, and the plaintiffs those of the appeal.

Vason, for the plaintiffs.

Micou, for the appellants.

SAME CASE—ON A RE-HEARING.

Where the sureties of a public officer bind themselves, severally, for a specific sum, they can, in no event, be made liable for a larger amount; but any one injured by the misfeasance of their principal, will have an action against each and all, until the whole amount for which they may be respectively bound shall be exhausted, or the claim satisfied.

Micou, for the appellants, prayed for a re-hearing.

BULLARD, J. A re-hearing has been asked for in this case,

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principally on the ground, that the sureties are not bound *in solido*, according to the terms of the bond. We are satisfied, upon examination of the bond, that they are not bound *in solido*. Each surety binds himself *severally* for a specific sum, beyond which, in no event, can he be liable. There are, consequently, eight *several* obligations, amounting in all to sixty thousand dollars, and the creditors of Hozey, on account of official misfeasance, have an action *severally* against each and all of the sureties, until the amount for which each may be bound shall be exhausted, provided that they are entitled to only one satisfaction.

It is also said, that the sum for which judgment is rendered is greater than is due to the parties, and that the sheriff is entitled to his fees. The boat sold for \$4150, and that is the sum the sheriff was condemned to bring into court for distribution. It is true that allowance ought to be made to the sureties for the fees due to the sheriff in that case, which he is entitled to retain.

The judgment will be amended accordingly, so as to condemn the sureties *severally*, instead of *in solido*, and reserving the sum which the sheriff has a right to retain for his fees.

It is therefore ordered that the judgment of the Commercial Court be annulled; that there be judgment in favor of the plaintiffs against the defendants, severally, in the sum of \$3801 75, with interest at 5 per cent per annum from judicial demand, with costs in the court below; the costs of appeal to be borne by the plaintiffs and appellees. And it is further ordered, that the plaintiffs have leave to take execution against each or any of the defendants for the above sum, provided there be but one satisfaction.

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EDWARD DUCLOS LANGE V. HIS CREDITORS.

The application, required by sect. 30 of the act of 20th February, 1817, to be made to the court by the syndic, for authority to sell the property of an insolvent, may be by motion, which is but an oral petition. The object of the law is answered, when the syndic is authorized by the court.

The appraisers of property surrendered by an insolvent, and ordered to be sold, are not required to be appointed by the insolvent and the syndic. They may be appointed and sworn by the court, before which the *concurso* is pending. It will be a sufficient compliance with art. 2180 of the Civil Code, which requires the sales of property ceded to creditors to be made on the same terms and under the same formalities as property seized on execution, if the formalities be substantially fulfilled.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, for the appellant. The syndic must apply *by petition* to the court, to be authorized to sell the property surrendered by the insolvent. Act of 1817, sec. 30. 2 Moreau's Dig. p. 432.

The appraisers ought to have been appointed by the syndic and the insolvent. The latter has a residuary interest in the property to be sold, the same as a defendant in execution.

L. Peirce, for the syndic. The application to the court, by motion, for authority to sell, was sufficient. The appraisers were appointed in conformity to the established practice in this State. The insolvent had ceased to be a party to the proceedings after the confirmation of the syndic.

MORPHY, J. John M. Bach is appellant from a judgment rendering absolute a rule, taken on him by the syndic in this case, to show cause why he should not sign a deed of sale for property of the estate adjudicated to him, and pay the price thereof. He showed for cause, that the property had been illegally and irregularly sold, and that the syndic could not give him a valid title to the same: *first*, because there was no legal order of court authorizing the sale; *secondly*, because the appraisers were appointed by the court, when they ought to have been appointed by the insolvent and the syndic.

I. We find in the record that, on a motion of the syndic, an order was made on the 5th of May, 1838, for the sale of the property surrendered by the insolvent. A motion is an oral petition. The

judge might have required it to be reduced to writing, but having granted the order, we cannot consider it illegal for having been rendered on a motion, instead of a petition. The object of the 30th section of the statute of 1817, to which we have been referred, is answered, when the syndic is authorized by the court to make the sale of the insolvent's property.*

II. Although the Civil Code, art. 2180, provides that sales of property ceded to creditors must be made on the same terms and under the same formalities as property seized on execution, it is clear that, by reason of the difference between the two cases, the rules prescribed for the one, cannot be literally followed in the other. It is sufficient if the required formalities are substantially fulfilled. As the insolvent, after the confirmation of the syndic, has been generally considered as no longer a party to the suit, the constant practice seems to have been, for the syndic to have the appraisers appointed, and sworn by the court before which the *concurso* is pending. The mode of appointment, suggested by the appellant as the proper one, is perhaps a greater approximation to the rules laid down in the Code of Practice for sales on execution; but as these cannot be followed throughout, so far, for instance, as relates to the share which the sheriff is to take in such appointment, and as the course hitherto pursued complies with the main requirement of the law, which is that a sworn and impartial appraisement be made, so as to protect from sacrifice the property to be sold, we cannot believe it our imperious duty to disturb this established practice, and thereby throw doubt and uncertainty on a large class of titles that have been acquired under it.

Judgment affirmed.

* This section provides that: "The definitive syndics shall apply by petition to the court which shall have ordered the meeting of creditors, to be authorized to sell at public auction, and to the last and highest bidder, all the insolvent debtor's property."

ALEXANDER PRIEUR and others v. THEIR CREDITORS.

The syndic of the creditors of an insolvent is their agent, and, like other agents, is bound to show due diligence in the discharge of his mandate, and to render a full and complete account of every item of property coming into his possession, supported by the necessary vouchers, showing how such property has been disposed of. With regard to the debts due to the estate, he is bound to show what portion has been paid, what proceedings have been had to enforce payment, or what reasons existed for not enforcing it. Any creditor has a right to call for such an account, and the burden of proving its correctness will be on the syndic.

The syndic of the creditors of an insolvent will not be entitled to his commission, until it is fully proved that he has faithfully and diligently administered the estate.

A tableau of distribution, filed by the syndic of the creditors of an insolvent as a final one, having been opposed by a creditor who had been put on it as entitled to a certain sum, was homologated so far as not opposed. Afterwards, on the trial of the opposition, there was a judgment declaring the tableau a provisional one, ordering the funds to be distributed in conformity thereto, and refusing to discharge the syndic, or to allow his commission; from which judgment both the opponent and the syndic appealed, the appeal taken by the latter being only devolutive. On a rule by the opponent on the syndic, to show cause why the amount for which he had been placed on the tableau, should not be paid to him: *Held*, that the appeal of the syndic being devolutive only, and the object of the rule being merely to enforce the judgment, the rule should have been made absolute.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

GARLAND, J. In May, 1834, Townsley, Prieur & Co., made a cession of their property, and at a meeting of their creditors, Alexander Prieur, one of the partners, was appointed syndic, and took upon himself the administration of the estate surrendered. The amount surrendered, in debts and property, was \$220,865 08, and the liabilities, direct and indirect, a considerable sum more. The creditors, at their meeting, fixed the terms of sale of the property surrendered; and their proceedings were soon after homologated. The record shows no further proceedings in the case until the 20th of December, 1838, when Joseph Lallande, as creditor on the *bilan*, called upon the syndic to file in court a statement of the funds he had collected, and of the amount he had then on hand, also a statement of his account with the Bank or Banks in which he deposited the funds, and, further, to show cause why he should not forthwith file a tableau of distribution and an account of his administration. In obedience to this order the syndic filed an account of various sums received and paid by him, amounting to

about \$58,000; and also a tableau of distribution, of which notice was given, and the creditors called on to make opposition. Some few days after, the judge made a further order on the syndic, to file a statement of his accounts with the Bank or Banks in which he deposited his funds, to which he replied that he had no other account than he had represented in the tableau, and prayed for the homologation of the account and his discharge as syndic.

To this account and tableau Lallande made opposition, on the grounds: *First*, That as it appeared from the schedule filed in 1834, that property and assets to the amount of \$220,865 08 had been surrendered, and as only \$57,209 06 were accounted for, the syndic ought to be compelled to render an account of the balance, amounting to nearly \$168,000.

Second, That as the syndic sold the real estate and property surrendered, without a special order of court, he is liable for its value, which is much more than he has accounted for, to wit, \$60,000.

Third, That the syndic had no right to pay to David Olivier, the amount of S. Cucullu's notes for \$2,212 50. He avers that those notes were held by Olivier as collateral security; that they were never pledged to him; and that the payment, in the manner which the syndic has made it, injures the opponent.

Fourth, That it appears that many persons, who are named by the opponent, were indebted to the insolvents in large sums of money, and that the account does not show, with but very small exceptions, the sums collected from them, or that any efforts have been made to recover those debts.

Fifth, That the syndic is not entitled to any commission, as he has not faithfully and diligently administered; and that the whole account should be rejected as irregular, being unsupported by vouchers, and affording no information to the creditors.

It is, therefore, prayed, that the account may be rejected, and the syndic ordered to file a new one prepared in conformity with the aforesaid grounds of opposition, and supported by vouchers, and exhibiting all the transactions of the syndic, and the disposition of the assets which came into his hands; that the syndic be made personally responsible for the value of the property which came into his hands, for the sum of \$2,212 50 paid to

Olivier, and for all the assets ceded to the insolvents, and which have not been administered.

On motion of the syndic the tableau was homologated, so far as it was not opposed, on the 23d of January, 1839.

On the first ground of opposition, the parish judge was of opinion that the syndic, being the agent of the creditors, was bound to render a full and complete account of every item of property that came into his possession, showing how it had been disposed of, what it produced, and, with regard to claims against the debtors of the estate, what part of such claims have been paid, what proceedings have been commenced to enforce the payment, and what reasons exist for not enforcing the payment of others, and to satisfy the creditors in all things that due diligence and attention have been bestowed in the fulfillment of the trust. The judge says that it is to be supposed that the syndic is willing to render such an account, but that as he has not done so, it is the right of every creditor to call for it.

As to the second ground, that the syndic sold the property surrendered without an order of court, the judge states that he sees nothing illegal in it, as the creditors fixed the terms of sale at their meeting, the deliberations of which were duly homologated. This the judge considers sufficient, without a special petition and order, which would have been issued of course, after the creditors had agreed among themselves. He, therefore, thought that the syndic had incurred no liability, but that it was his duty to satisfy the creditors as to the manner in which the property had been disposed of.

In relation to the third ground of objection, the judge decided that the payment to Olivier was correct, and states that the objection was abandoned on the trial, an authentic act of pledge having been given in evidence.

As to the fourth ground, that many persons were indebted to the estate in large sums of money, and that the tableau does not show what has been recovered, or what efforts have been made to recover such debts, the judge states this to be but a specification of the first point, on which he has given an opinion.

As to the fifth ground, that the syndic is not entitled to his commission, the judge says, that as long as it is not fully proved that

the syndic has faithfully and diligently administered the insolvents' estate, he is not entitled to remuneration as a mandatary. That the commission can only be claimed when a satisfactory discharge of the duties of the trust is shown, by the production of vouchers, and the giving of all necessary information as to the situation of the estate. That as the mandate had not been fulfilled, no commissions could then be allowed.

The tableau filed was, therefore, rejected, and fifteen days allowed to file a new one, showing a full statement of the assets and claims unaccounted for, with vouchers, and other evidence explaining why the claims owing to the estate have not been collected, accompanied with the books, titles, and papers belonging to the estate, or in any way connected with the syndicism.

In obedience to this judgment, the syndic presented another tableau of distribution, accompanied by statements in writing explaining the causes why the sums had not been collected, and what efforts had been made to collect them. This tableau, the creditors were again called on to oppose, if they thought proper, and the syndic prayed for his discharge ; but the statements were only those of the syndic himself, made as a commentary on each item.

Lallande made opposition to this tableau and statements, as unsatisfactory, and not sustained by documents, vouchers, and legal evidence ; and alleged that, as the syndic had failed to use proper efforts to collect the debts surrendered by the insolvents, he had injured the creditors, and ought to be made responsible for the amount to them. The opposition, then, proceeds to name ten persons or firms who owed \$12,512 05, all of which it is said was lost, except \$1000, by inattention and neglect. The names of fifteen other persons or firms were stated as debtors to the insolvents, and a similar allegation of negligence and responsibility alleged as to them.

The opponent, therefore, prays for a rejection of the syndic's commission, that he be made liable for all the debts due to the estate which have not been prosecuted with proper diligence, amounting altogether to \$40,000, and that a new tableau be filed distributing the sum which he may be condemned to pay with the other assets. A list of debtors, and the amount of the

sums due by each to the insolvents, was filed, amounting to \$16,227 13. The second tableau was also homologated, as far as not opposed.

The parties went to trial on this opposition, and it does not appear that any evidence was introduced, except the explanations filed by the syndic, and the papers already in the suit. The judge reviews the case at great length, and passes under examination each debt due to the insolvents set forth in the opposition of Lallande. The first question between the parties, was, on whom the burden of proof lay in the controversy. The syndic contended that the opponent must show that his account was incorrect, and that his personal explanations why the debts were not collected should be held as sufficient. The judge held that the syndic was the agent of the creditors; that as such he was charged to collect the debts owing to the insolvents and ceded to the creditors; that in rendering his accounts he was bound to give all necessary explanations and reasons why the debts were not collected, and to produce all necessary documents and vouchers. That obligation, says the judge, is perhaps more imperative, when the insolvent is himself the syndic, and, in all cases, the syndic, like other agents, is to show due diligence in the discharge of his mandate, and is bound to account for the assets. The right of the creditors to call on the syndic for a full account and explanations is fully admitted, and the judge declares that the explanations given are not such as the creditors had a right to expect. He adds that, from an examination of the claims, the "non-recovery" of which is not fully explained, he is satisfied that most of them could not be recovered; and that whilst the responsibility of the syndic is admitted, if any thing has been lost by neglect or delay, a sense of equity induces him to allow the syndic an opportunity to show, by proper evidence, that he has done all in his power to collect the debts and to comply with his obligations.

The court, therefore, refused to discharge the syndic, and disallowed his commissions until he should comply with his duties; but, considering the delays which had occurred since the filing of the two tableaux, and that the creditors are entitled to dividends

and have been unable to receive them in consequence of this opposition, which does not bear upon any portion of the funds in hand, it was adjudged that the tableau filed should be considered as provisional, and the syndic be ordered to distribute the funds in his hands accordingly; and that his commissions be suspended, and remain in his hands as funds belonging to the estate, subject to the order of court. It was further ordered, that the syndic should, within twenty days, file a final tableau of the estate, in which he should account, in a legal manner, for the twenty-one items of assets mentioned in the judgment, either by presenting the amount thereof for distribution, or showing due diligence in endeavoring to collect said claims; in default of which, it was declared that judgment should be rendered, on motion of any of the creditors, against the syndic, in his personal capacity, for the amount of such claims as were not legally accounted for. From this judgment the syndic has appealed; and the opponent has appealed from both judgments.

After these appeals were taken, Lallande took a rule on the syndic to show cause why he should not pay him the sum of \$678 79, which appears on the tableau of distribution to be due him. This rule was dismissed by the judge, on the ground that, as both parties had appealed from the judgment rendered on the oppositions filed, the case was then beyond his jurisdiction; and from this judgment Lallande has appealed.

L. Janin, for the opponent. The syndic should have been made responsible for the *value* of the real estate sold by him, it having been made without an order of court. But should it be determined that, under the 15th sect. of the act of 1817, and the 2d sect. of that of 1826, an order of court is unnecessary, where the creditors have themselves fixed the terms of sale, it will still be necessary to show that the sale was made agreeably to the votes of the creditors, which has not been proved in this instance. In the case of *Meilleur v. His Creditors*, 3 La. 532, it was decided that the syndic is personally responsible for amounts due to the insolvent, if he do not show that the debtor is insolvent, or that he has used due diligence.

L. Peirce, for the syndic. The general rule is, that when a

person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be presumed that he has duly performed it, unless the contrary be shown. 3 East, 192. 10 Ib. 216. 1 Phil. on Ev. 157.

The negative not admitting, in its nature, of direct proof, he who denies a fact is not called upon to give that evidence, which can only be circumstantial, till some evidence has been given to prove the fact alleged. "This general rule is, however, liable to exceptions, where a man is charged with not doing an act, which, by the law he is liable to do, for the law presumes that every man does his duty to society; and, therefore, on an information against Lord Halifax for not delivering up the Rolls of the Auditor of the Exchequer, the court required the prosecutor to prove the negative, viz., that he did not deliver them up. And in a late case, where an action was brought against the East India Company for putting on board the plaintiff's ship a cask, containing varnish of a combustible nature, without giving notice of its contents, whereby the cask took fire and destroyed the ship, this exception to the general rule was fully recognized, and the court held that it was incumbent on the plaintiff to prove that the defendants did not give due notice," &c. Peake's Evidence, 5, 6. Buller's N. P. 298. 2 Blackstone's Rep. 852. 11 Johns. 517.

A sheriff is not bound, at his peril, to prove a levy. The same rule prevails where a person, who must be presumed to have done his duty, is sued, and cannot be heard as a witness, (19 Johns. Rep. 348,) e. g. where the defendant pleads *plene administravit*, and the plaintiff replies that the defendant had assets, the issue lies upon the plaintiff, who must prove assets existing at the time of the writ being sued out. *Mara v. Quin*, 6 T. R. 10.

So, here, Lallande, the opponent alleges, that the syndic had assets, or should have had; and the proof lies upon him. Sometimes, in suits against executors, the plaintiff goes into equity to obtain an inventory of the assets, and this evidence is used in the court of law in this manner, "that where the executor, defendant, has not distinguished the *sperate* from the *desperate* debts in the inventory, it has been held that the whole shall, *prima facie*, be taken as assets, so as to throw the *onus* of proving some of

them desperate upon the defendant. Roscoe on Evidence, p. 467, 468.

Here the syndic has shown which are desperate, therefore the *onus* is not on him, but on the plaintiff. But in a later case Lord Ellenborough required further and reasonable evidence to be given, in order to show that the debts had actually been received by the defendant. *Gibs v. Dyson*, 1 Starkie C. 32. 2 Starkie on Evidence, part 4, p. 555. Roscoe on Evidence, 468.

GARLAND, J. The proceedings in this case seem to have been of an unusual character. Neither party introduced any evidence, except the record of the suit and the accounts filed; each party were satisfied as to many items, and no contest arose in relation to those about which there was a difference. The question was on whom the burden of proof lay; and after the judge had decided that question, neither party gave any testimony, but appealed from the order to file a new account.

Upon an examination of the principles settled by the Parish Judge, we are disposed to accord to them our approbation. The burden of showing diligence is, in our opinion, on the syndic; and when he files the account ordered by the judgment, and presents the evidence on which he relies to exempt himself from responsibility, we may judge of it, if brought before us; but the case is not now in a situation to enable us to give a final judgment. As to the delay of twenty days, given the syndic to file a final tableau, there is nothing in the record which enables us to say whether the judge properly exercised his discretion in granting the delay. In a case which embraces the settlement of old and long accounts, we can well imagine instances in which delay might be necessary, to enable a court to do justice, and where it would be proper that the judge should, *ex officio*, accord it to the parties, to obtain the necessary evidence to enable him to decide correctly. Whether this is such a case, we cannot say; and must, therefore, presume that the judge acted correctly.

As it is necessary that this cause should be further investigated in the inferior court, and as the question in relation to the sale of the property surrendered is one of importance, we think justice requires that it should be kept open, so as to permit any evidence that exists to be introduced.

As to the judgment on the rule, from which Lallande has appealed, we think the judge of the Parish Court erred. Lallandé was placed on the tableau for a certain sum, and the syndic admitted thereby that so much was due. Prieur's appeal is only devolutive, and does not prevent the execution of any judgment that was rendered. The judgment considered the tableau as provisional, and so far homologated it. As the object of the rule was merely to enforce the judgment, we do not think it could be arrested by the appeal.

The judgment of the Parish Court, so far as it discharges the rule taken by Lallande on the syndic to pay over the sum of \$678 79, is reversed, and the case remanded to be proceeded in according to law; we being of opinion that the court had jurisdiction and authority to act on that part of the case.

It is further ordered, that so much of the first judgment of the Parish Court as decrees the property surrendered to have been legally sold, be, so far as the responsibility of the syndic for his proceedings is concerned, annulled and reversed, and the question opened for further investigation on a new trial. And it is further ordered, that the judgments appealed from be affirmed, so far as they homologate the respective tableaux filed; and also in relation to the filing of the final tableau and account; and for the purpose of receiving said tableau and account, and deciding the questions that may hereafter arise, the case is remanded to the Parish Court to be proceeded in according to law. The costs of this appeal to be paid by the syndic.

JOHN STANTON v. JAMES C. PARKER.

The right of inquiring into the sufficiency of the surety on an appeal bond, and of deciding whether the appeal shall be suspensive or devolutive, or exclusively within the province of the court from which the appeal is taken. The sufficiency of the security may be tried, on motion; and, if an error be committed by the court in refusing to make the appeal suspensive and authorizing the issuing of execution, the remedy is by a writ of prohibition.

When the surety becomes insolvent after the appeal is brought up, it is the same as if no security had been given; and such insolvency must be inquired into before the court which granted the appeal. Though divested of all jurisdiction as to the case itself, it is empowered to decide whether execution may be taken out, notwithstanding the appeal.

In this case, *Hoffman*, for the appellee, moved the court for an order on the appellant, and his sureties in the appeal bond, to show cause why other security should not be furnished, or, in default thereof, why execution should not be issued from the court below.

Preston, for the appellant. The rule must be discharged. The court is without jurisdiction.

SIMON, J. This is an application by the plaintiff and appellee, for a rule on the defendant to show cause why other and solvent sureties on the appeal bond should not be furnished by him, or, in default thereof, why the plaintiff should not be permitted to issue execution in the court *a qua*.

The appellant denies our jurisdiction to try this rule, and we think he is right in the position.

When this case was brought up, the appeal was either suspensive or devolutive. If the appellant had furnished good and solvent security within the time prescribed by law, the appeal was suspensive; but the right of inquiring into the sufficiency of such security, was a matter properly and exclusively within the province of the lower court. Code of Prac. arts. 573, 574, 575 and 578. In the case of *The State v. Judge Buchanan*, 13 La. 576, this court said: "the judge receives the surety as such, on the representation of the appellant, without prejudice to the rights of the appellee, who can insist on having the security which the law requires, or, in default thereof, execution on his judgment." What court, then, has the power to say that the appeal is merely devo-

lutive, and that an execution should issue? Surely, the court *a qua*; and, as we said in the case reported in 19 La. 178, in which we recognized the power of the inferior tribunal to try, on motion, the sufficiency of the security furnished on an appeal bond, "if an error be committed by the court below, by refusing to give to the appeal the effect of a suspensive one, and by authorizing an execution to issue after becoming divested of jurisdiction, the proper remedy to correct such error, ought to be by a writ of prohibition, under the provisions of our laws."

In this case, however, the application is grounded on the alleged circumstance, that the surety has become insolvent since the appeal was brought up. If so, it is the same as if no security had ever been given; and, perhaps, the appeal ceasing to be suspensive, the appellee ought to be entitled to have his execution. But, again, this is a matter which has properly to be tried before the lower court, which, though divested of jurisdiction, as to the case itself and its merits, has nevertheless the power of pronouncing on the question, whether the appeal is or shall be suspensive or devolutive, and of saying whether the appellee shall be entitled to take out execution, or not, notwithstanding the appeal. The law and the constitution have not given us that power; and as it would have the effect of bringing originally before us, a matter untried in the inferior court, for the investigation of which evidence would necessarily have to be produced by both parties respectively, we cannot take upon ourselves to assume it.

Rule discharged.

The Inhabitants of New Orleans v. Hozey, late Sheriff, and others.

THE INHABITANTS OF THE PARISH OF NEW ORLEANS v. CHARLES F. HOZEY, late Sheriff, and others.

Whoever may be aggrieved by the official misconduct of a sheriff, has a direct action against each and every one of the sureties on his official bond, and is entitled to recover such an amount as will indemnify him, and no more ; nor can such sureties be compelled to pay into court, the amounts for which they may be ultimately made liable.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The petition of the Inhabitants of the parish of New Orleans, represented by the Police Jury, suing for themselves and such of the official creditors of Hozey, the late sheriff, as may join in the prosecution of this suit, represents, that the Police Jury placed in the hands of Hozey, while acting as sheriff, certain tax accounts, to be by him collected, and the amount thereof to be paid over to the Parish Treasurer according to law, to wit, for the parish taxes ending 10th April, 1839, amounting together to \$23,181 55, deducting the sum of \$4578 25 already paid over at different times.

The petitioners further say, that the clerk of the Parish Court transmitted to Hozey, while acting as sheriff, lists of fines imposed on persons summoned to attend said court, amounting together to \$1485, which were to be recovered by Hozey, and to be paid over to the Parish Treasurer. That the clerks of different courts in New Orleans transmitted to Hozey, certain lists of taxes on suits to be recovered by him, and the amount to be paid over. It is alleged that the amount yet due from Hozey is upwards of \$43,000.

They further allege, that Hozey was appointed sheriff, and, on the 30th of March, 1839, gave bond with Peters, Lockett, Kendig, Layton, Avery, Bach, Walton, and Louis Lallande Ferrière as sureties, the four former for the sum of \$8000 each, and the four latter for \$7000 each, making in all \$60,000.

The petitioners represent that Hozey is insolvent, and that various suits have been instituted against him and his sureties, the parties to which are seeking to obtain a preference over the other official creditors of Hozey. They further allege, that an equitable distribution ought to be made between all the official creditors

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of whatever may be recovered from Hozey and his sureties. They, therefore, pray that a judicial sequestration may be issued against the property and claims of Hozey ; and that a sequestrator may be appointed to receive all the fees of office yet due to him, and to keep them until a distribution thereof to the official creditors shall be ordered. That all persons may be enjoined from paying to any one but the said sequestrator, any part of the fees due to Hozey. That the aforesaid sureties may be also enjoined from paying to any person but the said sequestrator, the whole, or any part of the amount secured by them ; and that the amount of said bond be distributed among all the official creditors of Hozey. That the sequestrator may be authorized to collect by suit, or otherwise, the fees of office due to Hozey ; and to institute suit against the sureties on said bond, for the benefit of all the official creditors. They further pray that the sureties may be made parties to the suit ; that they may be condemned to pay to the sequestrator the amounts for which they are sureties respectively, for the benefit of the creditors aforesaid. That Hozey may be decreed and condemned to pay the sum of \$43,630 30, with interest thereon, at five per cent per annum, and the costs of suit ; and whatever amount may be due to other creditors of Hozey who may become parties to the suit.

The Judge of the Commercial Court, on the presentation of this petition, ordered the books and papers of the late sheriff, and all the fees of office due to him, to be sequestered, and all persons to be enjoined from paying to Hozey any fees due to him in his late capacity. He ordered Frederic Buisson to be appointed judicial sequestrator, with authority to receive and collect, by suit, or otherwise, all the fees of office due to Hozey. He further ordered the sequestrator to institute suits against the sureties of said sheriff on their bonds, to give notice, through the newspapers, to all the official creditors of Hozey, to present their claims within thirty days, and the official sureties of Hozey to be made parties to the suit. This court is not called upon to review the proceedings had, or the judgment pronounced in the court below, except so far as they concern the sureties of Hozey, who alone have appealed. The judgment as to the sureties was, that the plaintiffs recover from Peters, Lockett, Kendig, and Layton, the sum of

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\$8000 each, and the sum of \$7000 each from Avery, Bach, Walton, and Ferrière ; and that the judgment rendered against any of the sureties be satisfied, by the making and bringing into court the sum for which judgment is given against said sureties in any of the suits against said Hozey, with costs.

This judgment appears to us to be clearly *ultra petitum*. The plaintiffs prayed that the sureties might be condemned to pay to the sequestrator the amount of the bond, for general distribution among the official creditors. The judgment gives to the plaintiffs the whole amount to cover arrearages of taxes, and fines, and taxes on suits, with which the late sheriff is charged, although the sureties were enjoined from paying to any other person than the judicial sequestrator. The liability of the sureties on the official bond of the sheriff, to pay arrearages of parish taxes, or State taxés, or taxes on suits, is by no means clear ; and the plaintiffs did not ask for judgment against them on that ground. On the contrary, they prayed that the sequestrator might be ordered to institute a suit upon the bond, which was accordingly ordered ; but instead of waiting for the sequestrator to sue as ordered, the plaintiffs take judgment against the sureties for the whole amount of the bond.

Whoever may be aggrieved by the official misconduct of a sheriff, has a direct action against each and every one of his sureties on his official bond ; and has a right to recover such an amount as will indemnify him, and no more. The idea that every person so complaining, however trivial the amount to which he may be in truth entitled, is authorized to recover the whole penalty of the bond from all the sureties, we have already said does not receive the sanction of this court ; nor can the sureties be compelled to pay into court the amount for which each may be ultimately made liable, for the reasons given in the case of *Dougherty and another v. Peters and others, Sureties of Hozey*, lately decided by this court (*ante* p. 534). In the present case, we are of opinion that the Police Jury has not shown, even if it had averred, its right to recover against the sureties.

It is, therefore, adjudged and decreed that the judgment of the Commercial Court, so far as it relates to the sureties, be reversed ;

Johnson and another v. Hozey, late Sheriff, and others.

and that ours be for them, as in case of nonsuit, with costs in both courts.

Morel and Eyma, for the plaintiffs.

Micou, for the appellants.

WILLIAM JOHNSON and another v. CHARLES F. HOZEY, late Sheriff, and others.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The plaintiffs represent that they lately recovered judgment against sundry persons in the Commercial Court, upon which execution issued, and Hozey, the late sheriff, received the sum of \$244 62, which he neglects and refuses to pay to them. They, therefore, bring suit against the late sheriff, and make his sureties parties, and pray judgment that they may be condemned to bring into court the whole sum of sixty thousand dollars, the penalties of their bonds. Judgment was rendered accordingly, and the sureties have appealed.

The amount claimed would have been insufficient to give jurisdiction to this court, if it had not been coupled with the prayer for judgment for the amount of the penalties of the bonds. The sheriff's return upon the execution shows that he received the amount, after the establishment of the sheriffalty of the Criminal Court, to wit, in May, 1840; and, consequently, we cannot distinguish this case from several others lately decided, in which we held that the sureties were released. *Ante*, p. 479.

The judgment of the Commercial Court is, therefore, reversed, and ours is for the sureties, with costs in both courts.

Potts, for the plaintiffs.

Micou, for the appellants.

JACOB L. FLORANCE v. CHRISTOPHER ADAMS, Syndic.

The same person cannot be the agent of two contracting parties in the same transaction, where their interests are in conflict; still less can he act as such, where he has a personal interest in the matter adverse to that of one of the parties.

One acting as the agent and on behalf of a partnership, of which he is a member, cannot transfer a note to himself as the agent of a third party. The transfer of a note is a contract, requiring the concurrence of two minds.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Josephs, for the appellant, and *Chinn*, for the syndic, submitted this case without argument.

MORPHY, J. Jacob L. Florance complains of a judgment dismissing his opposition to a tableau of distribution, filed by the syndic of the creditors of Nathaniel Cox. He claims \$1590 24 on a promissory note drawn by one W. Hawley, to the order of John F. Smith & Co, endorsed by the latter, and by Nathaniel Cox, through John F. Smith acting as his agent. In support of his demand Florance produced, on the trial, the note itself, a regular protest and certificate of notices to the endorsers, together with a notarial power of attorney from Cox to John F. Smith. This instrument gives power to Smith "for him, Cox, and in his name, and in his behalf, and to his use, to conduct, manage, &c. his affairs, business, and concerns, to make and endorse promissory notes in his name, to draw money out of bank where it has been deposited in his name, to borrow money from bank on his notes, or those of others which come into his hands for his use, &c. &c., and, generally, to do every act touching the business or concerns of said Cox." No evidence was offered by the syndic, but there is an admission in the record, that the body of the note sued upon, the signature of John F. Smith & Co., and that of Nathaniel Cox by John F. Smith, as endorsers, are in the handwriting of John F. Smith. The judge below was of opinion that the estate was not bound by this endorsement, as it appeared to him "that the note sued upon was the property of Smith, and, that to enable himself to negotiate it with a broker, he endorsed N. Cox' name on it, for his own use and benefit, thereby using the name

of Cox, not in transacting Cox' business, but his own." It is said, that there is no evidence whatever, in the record, of the facts upon which the judge has based the conclusion to which he has arrived. The note shows upon its face that it was, at one time, the property of John F. Smith & Co. If so, it could not be legally transferred by John F. Smith, acting in his own right and on behalf of his firm, to John F. Smith, acting as the agent of Nathaniel Cox. There is no principle better settled than that the same person cannot be the agent of two contracting parties, in the same transaction, when their interests are in conflict; still less can he act as such, when he has in the matter a personal interest adverse to that of one of the parties. The transfer of a note is a contract, and, therefore, the making of it requires the concurrence of two minds (*aggregatio mentium*). Here there was but one natural person acting, at the same time, as transferrer and transferee. No agreement could be formed, and, therefore, no transfer took place. The note remained the property of John F. Smith & Co. The endorsement of Nathaniel Cox, put on it afterwards by John F. Smith, cannot but be considered as made for his own purposes and advantage, and not for the use and benefit of his principal, Cox. This he had clearly no right to do under his mandate. 11 Mart. 297. 6 La. 414. 15 La. 397. Story on Agency, sec. 210, *et sequentes*. It is urged that Florance is a *bona fide* holder; that no proof was given that the endorsement was not for Cox' benefit; and that we are not to presume that Smith exceeded his powers, or that Florance was aware that he had done so. From a mere inspection of the note, he must have known the true character of this endorsement. He found it placed by Cox' agent on a note belonging to the firm of which the agent was a member. He could hardly believe that this was done for the advantage and use of Cox, and in the ordinary course of the mandate.

Judgment affirmed.

SUCCESSION OF JAMES MADISON ZACHARIE—JAMES WATERS
ZACHARIE, Appellant.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

GARLAND, J. From a record of three hundred and fifty pages, made up of petitions, oppositions, accounts, notes, protests, evidence, parol and documentary, bills of exception, and all the mortuary proceedings relating to the succession of James Madison Zacharie, we have extracted the facts of this case, which presents no very important legal principles. In June, 1835, J. M. Zacharie died, leaving a widow, an heir *en ventre sa mère*, and several brothers and sisters. George W. Zacharie, one of the brothers, was, by consent of all parties, appointed administrator; and, after an inventory and sale of the property, which amounted to nearly \$128,000, he presented to the Court of Probates a statement of the affairs of the succession and a list of privileged and ordinary debts, which he asked that he might be authorized to pay in the order stated in the tableau, amounting altogether to about \$140,000. Of this sum, \$52,576 18 was claimed by J. W. Zacharie & Co., as being due on an open account, for cash advances, and for a variety of articles sold, and a number of notes given by the deceased. The presentation of this statement of debts and privileges, produced a host of opponents, among whom was the widow, in her own right, and as tutrix of her minor child, born after the death of the father. Before an examination was made into the merits of this provisional statement, and the various oppositions to it, the administrator filed an amended statement of debts and privileges, which he prayed might be confirmed, and that he might be ordered to pay in conformity with it. This statement does not seem to have been more satisfactory to the creditors than the first; and, among a number of opponents, the widow was again prominent. She opposed the whole statement, denied the existence of the debts claimed, but more particularly attacked the claim of J. W. Zacharie & Co., which she alleges to be wholly unfounded, although admitted by the administrator. She avers, that the administrator has not accounted for all the assets and property be-

Succession of James Madison Zacharie.

longing to the succession ; and she especially opposes a claim set up by him.

The provisional tableau or statement was homologated so far as not opposed, and a trial had on the various oppositions, that to the claim of J. W. Zacharie & Co. being the principal, and the one on which this appeal is founded. The Judge of the Court of Probates reduced the claim of Zacharie & Co. \$13,751 97, and allowed the balance, from which James W. Zacharie has appealed. In this court, the widow prays that other sums may be disallowed, and the whole claim rejected.

The Judge of the Court of Probates disallowed six items for cash advanced at different times, from the 18th of October, 1834, to May 2d, 1835, amounting to \$5,720, on the ground that each item was over five hundred dollars, and was proved by only one witness, unsustained by corroborating circumstances. In this, we think, the judge erred. The testimony of one of the clerks of Zacharie & Co. to these items, is direct and positive. It appears that the charges were made regularly on the books of the firm. It is proved that James Madison Zacharie, was the near relative of J. W. Zacharie, who set him up in business as an architect and builder, and assisted him by endorsements ; and it is proved by several witnesses that he was in the habit of lending him money, and doing all in his power to advance his interests. The deceased made the counting house of Zacharie & Co. his principal place of business ; he was in and out every day ; and people called there to see him on business. He had access to the books of the house, and all the clerks testify that he was in the habit of examining his account whenever he pleased, and that he did so frequently, and, particularly, a short time before his death. These items were then in the account, and he did not pretend that they were incorrect. It is also in evidence that J. M. Zacharie and J. W. Zacharie reposed the utmost confidence in each other ; and that they had purchased on the corner of Canal and Rampart streets two lots of ground, on which they erected six dwelling houses on speculation, or for rent. They also purchased several lots between Old Levée and Clinton-streets, near Bien-ville, on which large stores were erected. All this property stood in the name of James Madison Zacharie, but his relative was

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known to their intimate friends, as being a partner. Houses were being erected on some or all of these lots, at the time these advances of money were made. These buildings are proved to have cost large sums of money. At the same time James Madison Zacharie was carrying on his business as a builder, and had large contracts with Olivier, Thomas Barrett and others, which required a heavy outlay of money. The sums he was to receive from his employers were payable in instalments, and it is shown that he was obliged to have considerable sums every week to pay his workmen, and for labor and materials. It is proved his workmen were paid their wages every Saturday evening; and by reference to the American Almanac, for the years 1834 and 1835, it appears, that all these sums were advanced on a Saturday, except one, and that is charged as having been advanced on Monday. All these are, in our opinion, circumstances that corroborate and sustain the testimony of the witness, who swears to these advances having been made.

The next items objected to, are a note of \$4000, dated December 5th, 1834, payable ninety days after date, drawn to the order of J. W. Zacharie & Co., and another note for \$3,500, dated March 7th, 1835, payable to the same payees, sixty days after date. These notes were discounted at the Louisiana State Bank, as appears by the testimony of Relf, the Cashier, who says that the one was given in renewal of the other. The evidence of other witnesses shows that these were accommodation notes, and Relf so considered them; but the proceeds went to the credit of J. W. Zacharie & Co., as it was not marked on the face of the notes that they were for the accommodation of the drawer. The latter note, it is alleged, was renewed, in part, at maturity, by a note for \$2,300, which was no doubt taken up by Zacharie & Co. In the account of the claimants, the estate is charged with \$4000, on the 7th of March, 1835, as having been applied to the note of the 5th of December, 1834. At the date of this charge it is certain that Zacharie & Co. had received the proceeds of the note for \$3,500, and when it became due they received the proceeds of another note, for none of which is any credit allowed to the estate. From a perusal of the evidence of Relf, and that of Faures, we cannot resist the impression that these notes were given in renewal of each other, and

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we think that the Probate Judge did not err in deducting \$7,500 from the claim.

The opponent further contends that the sum of \$5,266 66 should be deducted, being the amount of a note given by the deceased to Zacharie & Co., endorsed by them, and afterwards taken up. This note was given by J. M. Zacharie to obtain a loan of \$5000 from Moore, payable in eight months. That gentleman testifies that he gave the money to Theodore Zacharie, the clerk of J. W. Zacharie & Co. and the latter swears that he gave it to James M. Zacharie, when the note was presented. Upon this evidence, we cannot say that the Judge of the Court of Probates erred in allowing this amount to the claimant.

The opponent further states, that a note for \$3,500, dated February 3d, 1835, payable to the order of J. W. Zacharie & Co. sixty days after date, should be deducted from their claim. This note, it appears, was discounted in the Union Bank of Louisiana, and the proceeds went to the credit of the drawees. Faures, their clerk, says that the proceeds of this note, although he did not know of his own knowledge where it was discounted, went to pay a note of the deceased for \$4000, dated the 2d of December, 1834, which is not produced, either by the firm of Zacharie & Co., or by the administrator. We do not think the application of the proceeds of this note to a debt of the deceased, is sufficiently established, and are of opinion that it ought to be deducted.

In the argument of the cause, the counsel for the widow, has urged that it was the intention of Zacharie & Co., and of the administrator so to manage the succession, as to make it appear insolvent, when in fact it was not so, and thereby to defraud the widow and heir. It is in evidence, that soon after the death of James Madison Zacharie, his relation James stated, that he thought the succession would be worth about \$30,000. It does not appear that at this time a list of the debts had been made or their amount ascertained, and he might, from the amount of property, have supposed the estate worth that much; but when the amount was ascertained, it is proved that J. W. Zacharie gave a different opinion. It is in evidence that George Zacharie, also stated, a few days after his brother's death, that the succession was worth \$30,000 or \$40,000, but that it was in his power to make it ap-

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pear insolvent ; but there is no proof that James ever made any such declaration, or knew of its having been made. However reprehensible such a remark or intention may have been, on the part of the administrator George W. Zacharie, it is not in our power now to apply a remedy, as the widow is not an appellant from any part of the judgment rendered, and does not ask for any amendment of it, except in relation to J. W. Zacharie & Co.

The judgment of the Court of Probates, is, therefore, ordered to be amended, by adding to the claim of J. W. Zacharie & Co., the sum of two thousand two hundred and twenty dollars, it being the difference between the sum of \$5,720, which we think was improperly rejected by the Court of Probates, and the sum of \$3,500 which was illegally admitted ; and is, in all other respects, affirmed, with costs.

T. Slidell, for the appellant.

Preston, contra.

WILLIAM D. WALTON and another v. THE LOUISIANA STATE MARINE AND FIRE INSURANCE COMPANY.

Where a verdict had been found, but no final judgment rendered, and defendant appealed on the refusal to grant a new trial, the appeal will be dismissed.

APPEAL from the Commercial Court of New Orleans, *Watts, J. G. Strawbridge*, for the appellants.

L. Janin, for the defendants.

MARTIN, J.* In this case the plaintiffs had a verdict, which the court ordered to be recorded. Being dissatisfied therewith, they moved for a new trial, which was refused. The judge expressed his dissatisfaction with the verdict, but stated that the case presented a mere question of law, which he thought best to submit to the decision of this tribunal ; whereupon, he omitted to give any judgment on the verdict. The appeal cannot be sustained, on the denial of a new trial ; nor until there be a final judgment.

Appeal dismissed.

* MORPHY, J., being interested, did not sit on the trial of this case.

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SAME CASE.

Plaintiffs, who were grocers, had two policies of insurance on their stock in trade. Having subsequently purchased the stock of another grocer, which had been insured by the defendants, they removed their own stock to the establishment of their vendor, whose policy had been transferred to them with the consent of defendants. Plaintiffs also obtained from their own insurers transfers of the policies on the stock in their former establishment to the same stock in the store to which they removed. The policies contained the usual clause requiring notice to the insurers, and an endorsement on the policy, of any other insurance elsewhere on the same stock, on pain of forfeiture. Plaintiffs omitted to notify defendants of the two insurances, previously existing on their stock. The stock being injured by fire, in an action against defendants: *Held*, that, by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock in trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock; and that, having failed to do so, they cannot recover.

THIS appeal having been dismissed in consequence of an omission of the clerk to transcribe the final judgment rendered below, a copy of that judgment was brought up, by consent, and the case submitted.

G. Strawbridge, for the plaintiffs, cited 4 La. 542. 6 Ib. 537. 12 Ib. 176. 4 Mason, 296. 7 Peters, 69.

L. Janin, contra, cited 3 Kent's Com. 374. *Harris v. Ohio Ins. Co.* 5 Hammond's Ohio Rep. 466.

MARTIN, J. The plaintiffs purchased the stock in trade of Lawrence, a grocer, in the stores Nos. 28 and 29 New Levée street, which was insured in the Louisiana State Marine and Fire Insurance Company. His policy extended to his stock and consignments held in trust, contained in the store. It was transferred to the plaintiffs with the assent of the Company. At that time the plaintiffs had a grocery store, and a policy in the Merchant's Office, and another in the Firemen's Office, each for ten thousand dollars. The terms of these policies are literally the same as that of Lawrence. All these policies contained the usual clause that notice should be given to the Company, and be endorsed on the policy, of all insurances made with other Companies on the goods insured; and that unless such a notice be given, the insured shall not be entitled to recover.

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Soon after the purchase the plaintiffs removed all the goods in their store to Nos. 28 and 29 New Levée street, which now contained all the goods insured by them, and by Lawrence, their vendor.

A fire greatly damaged these goods. The injury was valued at \$7564 22, and the object of the present suit is to recover one-half of that sum, the other half having been paid by the two other Companies. The plaintiffs had a verdict and judgment for fifteen hundred dollars, and appealed, after an unsuccessful attempt to obtain a new trial. The defendants pray that the judgment may be reversed, and that ours be in their favor. The counsel for the defendants and appellees has urged that the plaintiffs and appellants cannot recover, because there was a double insurance upon the goods, of which no notice was given. The plaintiffs' counsel contends, that the clause which requires notice of a double insurance is a penal one, and ought not to be extended by implication; and that it is the business of the defendants to show, that the goods insured by them were insured by the plaintiffs in the office of another Company. The defendants think that they have done so, by showing that those goods were mixed with others insured elsewhere. The counsel for the appellants asks whether, if the goods insured by the plaintiffs were sugar, and those insured by Lawrence were salt, it could be said that the policy on the salt was a policy on the sugar; and whether, supposing that the merchandize in the stores Nos. 28 and 29 had been insured in different offices, and the insured had taken down the partition wall and called the enlarged store No. 28, this circumstance would defeat both policies? He contends that it would not, because the objects insured by each office could be distinctly known, and the loss arising under the two policies easily ascertained. That a circumstance creating a difficulty in fixing the amount of loss chargeable to each, is very different from a double insurance; and that the difficulty in the present case is chargeable to the defendants, their President having refused to join those of the two other Companies in ascertaining the loss.

The record shows that on the removal of the goods from their store, to Nos. 28 and 29 New Levée streets, the plaintiffs obtained from their insurers a transfer of the policies on the goods in their

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former store to the same goods in the stores Nos. 28 and 29. By consenting to the transfer of the policy of Lawrence to the plaintiffs, the defendants became the insurers of the stock in trade of the plaintiffs in Lawrence's former store, which now consisted of the goods purchased from Lawrence and those of the plaintiffs removed from their former establishment. There is no doubt, had the stock in trade of the plaintiffs in their former store been sugar, and that purchased from Lawrence salt, that both the sugar and salt would have constituted the plaintiffs' stock in trade, and that the defendants would have become the insurers of the whole stock, *id est* of the sugar and salt, to the extent of the amount insured, in the same manner as if the plaintiffs, without any purchase from Lawrence, had added a quantity of salt to the sugar which they had in their former store. The former stock in trade of the plaintiffs, and that of Lawrence from the time of the purchase, constituted the stock of the plaintiffs, on which they had an insurance in the office of the defendants for \$20,000, under the policy transferred by Lawrence with the consent of the defendants, and two other insurances in the Merchants and Firemen's Insurance Offices, for ten thousand dollars each. The plaintiffs were, therefore, bound to give notice that, independently of the insurance of the defendants' office, their stock in trade was insured elsewhere to an extent equal to that insured by the defendants. Their neglect to give that notice, is properly pleaded in bar to their recovery. It is due to the Judge of the Commercial Court to say that such was his opinion, expressed at full length in the reasons which he gave for refusing a new trial, in which he observed that the verdict ought to have been for the defendants, and was clearly a compromise between what was considered the law and the equity of the case. He thought it useless to send the case to another jury, as the facts were not disputed, and there was no contrariety of evidence; and as the whole case would be before us upon a mere question of law.

It is, therefore, ordered, that the judgment be annulled, and that ours be for the defendants, with costs in both courts.

The State v. The Judge of the Commercial Court of New Orleans.

THE STATE v. THE JUDGE OF THE COMMERCIAL COURT OF NEW ORLEANS.

Plaintiffs having issued execution against defendants, took a rule on the latter to show cause why they should not be ordered to produce their books, that plaintiffs might inspect them. The rule was made absolute, and the sheriff ordered to seize the books. On an application by defendants for a writ of prohibition: *Held*, that if they had sustained or apprehended irreparable injury, their remedy was by appeal.

RULE on the judge of the Commercial Court of New Orleans, *Watts, J.*, to show cause why a writ of prohibition should not be issued.

Micou, for the applicants.

MARTIN, J. On an affidavit of the defendants in the case of *Ormsby and others v. Bedford and another*, that the plaintiffs, who had obtained a judgment against them in the Commercial Court and issued execution thereon, had taken a rule on them to show cause why they should not produce their books of account, that the plaintiffs might inspect them—that the rule had been made absolute, notwithstanding the opposition of the defendants—and that, in pursuance thereof, an order had been issued to the sheriff commanding him to seize forthwith the said books, this court granted a rule on the judge, commanding him to show cause why a writ of prohibition should not issue to prevent the execution of the said order.

The judge has shown for cause, that, imprisonment for debt having been abolished, creditors have been authorized to garnishee the debtors of their debtors, to put interrogatories to them, and, on ascertaining the amount due to their own debtors, to have execution therefor. That the Commercial Court considered the proceedings before it in the nature of a bill of discovery, by which the plaintiffs sought to find out the debtors of their debtors, in order that they might be proceeded against. That the defendants having refused to bring their books into court, he thought the plaintiffs were entitled to the order issued to the sheriff. That on a bill of discovery, if the defendant refuse to name his debtors, he may be imprisoned. That he has always been opposed to constructive contempts, but considers that it is as much his duty to

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devise remedies for cases unprovided for, as to lay down rules of right where the law is silent ; and that the twenty-first article of the Civil Code applies equally to matters of remedy as to those of right. That the Commercial Court, being a court of equity as well as of law, may devise and frame writs of execution and other orders, to accomplish the final purposes of justice.

It does not appear to us that the present case is one in which we are legally authorized to interfere. If the defendants have sustained an irreparable injury by the order for the production of their books, or if, in the ulterior proceedings, they apprehend such an injury, they may be entitled to relief at our hands by an appeal.

Rule discharged.

JOHN SEIP v. CHARLES F. HOZEY, late Sheriff, and others.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* There was a judgment in this case against the sureties of Hozey, for the whole amount for which they were respectively liable on his official bond, to be discharged on payment into court of \$690, the amount claimed by the petitioner, with costs of suit. Layton, Ferrière, and Bach, three of the securities, have appealed.

BULLARD, J. The plaintiff represents that Pringle & Co. instituted suit against him by attachment in the Parish Court, to recover damages for an alleged theft committed by his slave. That, by agreement of parties, the slave was sold by Hozey, the late sheriff, the price to await the decision of the cause ; and that the slave sold for \$690. He further represents, that Pringle & Co. afterwards transferred the case to the Commercial Court, which refused to take cognizance of, and finally dismissed it ; and that the Parish Court refused to resume jurisdiction. Whereupon he alleges his right to recover back the price of the slave from the sheriff and his sureties.

Pringle & Co. having failed in their action, the present plaintiff

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has an undoubted right to be re-placed in the position in which he was before the institution of the suit. He has a right to look to the sheriff for such an amount as remained in his hands. It is, however, just that credit be given for what he paid by consent of parties. The plaintiff's attorney authorized the sheriff to pay to Pringle & Co. \$230, and this was sanctioned by the other party. That would leave a balance in the hands of Hozey of \$460, for which the plaintiff is entitled to judgment against the sureties.

The judgment of the Commercial Court is, therefore, reversed ; and it is ordered, that the plaintiff recover of the defendants, sureties of Hozey, severally, the sum of four hundred and sixty dollars, with interest, at five per cent, from judicial demand, provided that satisfaction be entered as to all the defendants on the payment of the above sum, with interest and costs, by one or more of said defendants ; and that the defendants pay the costs of the court below, those of this court to be borne by the plaintiff and appellee.

Vason, for the plaintiff.

Micou and *Preston*, for the appellants.

EDWARD GARDERE *v.* CHARLES F. HOZEY, late Sheriff, and
others.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.
L. Janin, for the plaintiff.

Micou, for the appellants.

BULLARD, J. This is one of two suits by the clerk of the Commercial Court against the late sheriff and his sureties, to recover an amount of fees due to the plaintiff, alleged to have been collected by the sheriff and not accounted for. Judgment was rendered for \$1901 52, and the sureties have appealed.

The cases were argued in this court at the same time with several others, involving various grounds of defence, and we came

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to the conclusion that the sureties of the late sheriff were not liable for moneys which came into his hands after the 1st of April, 1840, the date of the appointment of the sheriff of the Criminal Court. In the present case the amount thus received, and embraced in the judgment below was \$1134 04. After making allowance therefor, there appears a balance due in this case to the plaintiff of \$767 45, for which he is entitled to judgment.

It is, therefore, ordered, that the judgment of the Commercial Court be reversed, and that the plaintiff recover of the sureties of Hozey, severally, the sum of \$767 45, with interest at five per cent from judicial demand, and the costs of the court below, those of the appeal to be paid by the plaintiff; provided that satisfaction shall be entered as to all the defendants, upon the payment by one or more of the sureties of the aforesaid sum.

On an application for a re-hearing in this case, the plaintiff having withdrawn, but without prejudice to his rights, his claim to the items embraced in the defendants' petition for a re-hearing, it was ordered that the judgment should be reduced to the sum of \$587 45, with interest from judicial demand, and costs in the court below; reserving to the plaintiff, by consent of the counsel for the defendants, the right to sue again for the sum of \$180, now excluded from this judgment, being for costs collected under the writs enumerated in the defendants' petition for a re-hearing, as if a discontinuance had been entered for said sum in the court below.

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APPEAL from the Commercial Court of New Orleans, *Watts, J. L. Janin*, for the plaintiff.

Micou, for the appellants.

BULLARD J. This case, between the same parties, cannot be distinguished in principle from the one just decided. Making allowance for sums received by the sheriff after the first of April, 1840, as shown by the record, there will remain a balance due to the plaintiff of \$1627 26, instead of \$2901 58, as found by the court below.

It is, therefore, ordered that the judgment of the Commercial Court be reversed; and that the plaintiff recover of the sureties of Hozey, severally, the sum of \$1627 26, with interest at five per cent from judicial demand, and costs of the court below, those of the appeal to be paid by the plaintiff; provided, that satisfaction shall be entered as to all the defendants, upon the payment by one or more of said sureties of the aforesaid amount.

On an application for a re-hearing in this case, the plaintiff having withdrawn, but without prejudice to his rights, his claim to the items embraced in the defendants' petition for a re-hearing, it was ordered that the judgment should be reduced to the sum of \$788 33, with interest from judicial demand, and costs in the court below; reserving to the plaintiff, by consent of the counsel for the defendants, the right to sue again for the sum of \$838 93, now excluded from this judgment, being for costs collected under the writs enumerated in the defendants' petition for a re-hearing, as if a discontinuance had been entered for said sum in the court below.

MANUEL SIMON CUCULLU and others v. THE UNION INSURANCE COMPANY.

Judgment against an Insurance Company, and execution returned unsatisfied. Under the 13th sect. of the act of 20 March, 1839, plaintiffs interrogated the appellants, who admitted that they were stockholders in the Company. It was proved that the latter were responsible for a balance due on their shares of stock, which was liable to be called in by the Directors. *Held*, that plaintiffs might exercise against the appellants, all the rights which the defendants could have exercised against them; and that, the amount of plaintiffs' claim being less than that which appellants were liable to be called on to pay on their stock, the former was entitled to an execution against them.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiffs.

Hoffman, for the appellants.

MARTIN, J. The plaintiffs having obtained judgment, summoned the Atchafalaya Rail Road and Banking Company as garnishees, and interrogated them in order to discover the amount due by that Company to the defendants, as follows :

First. Are you not stockholders in the Union Insurance Company, and for how many shares ?

Second. How much have you paid on each share ?

Third. Does not the amount not yet paid on your stock, exceed five thousand dollars ?

The following answers were given :

First. This Bank does own stock in the Union Insurance Company ; the number of shares, I presume, the books of the office will show.

Second. All that has been legally called for.

Third. This Bank is not indebted to said Insurance Company.

The plaintiffs denied the truth of the answers, and issue was joined thereon. At the trial, it was admitted in open court that the Bank subscribed for one thousand shares of the stock, and had paid only five dollars per share ; and that there are other subscribers who have not paid more.

The plaintiffs had judgment against the Bank for the amount of

their judgment against the defendants, to wit, one thousand dollars, with interest and costs, and the Bank has appealed.

The charter of the Insurance Company provides, that it shall have a capital of three hundred thousand dollars, divided in shares of fifty dollars each, on which five dollars are to be paid at the time of subscribing, in cash, and the like sum in an endorsed note at sixty days; a like sum of five dollars per share, in a like note, payable in ninety days; a like sum payable in four months; and ten dollars on each share payable in six months from the date of subscription. The rest to be paid when called for by the Board.

The counsel for the garnishees and appellants contends that the cash payment and the notes were necessary to constitute a stockholder; that his clients have sworn that they have paid five dollars only on each share; and that we must, therefore, conclude they have not given the notes, that they are not stockholders, and consequently owe nothing. In the answer to the first interrogatory they swore that they own stock. They are, therefore, stockholders; and we must assume that they have done what was necessary to constitute them such. It is true that they swear they have paid five dollars, only, on each share, from which an inference is attempted to be drawn that they have not given the notes required to accompany the cash payment. It is established, indeed, that the notes are unpaid, but not that they were not given. The counsel for the garnishees has farther urged that if the notes were given, and the Bank thereby became stockholders, the plaintiffs cannot expect them to pay the amount of those notes until they are produced, or they are otherwise absolved from the obligation of paying them to the holders. This is certainly true. But it is not denied that there is twenty dollars due on each share, payable at the call of the Direction; and it is sworn, in the second answer, that all has been paid that has been legally called for. Leaving, therefore, out of view the five dollars which were paid in cash, and the sums for which the notes of the Bank may be afloat, there remains due twenty dollars on each share, which is sworn not to have been paid. The Bank being holders of one thousand shares owe forty-five thousand dollars. Judgment, therefore, was not incorrectly given against them, for a little more than one thousand dollars.

It is further contended, that the plaintiffs have mistaken their remedy. It is admitted that there are other stockholders who are debtors for part of their stock; and the Directors of the Insurance Company ought to have been compelled by a writ of mandamus to enforce payment from them. The Bank might have been compelled, by a suit, to complete the payment of their stock, and the claim could not have been resisted nor delayed on the ground that other stockholders in the same situation as the Bank, were not pursued; and the plaintiffs may exercise against the debtors of the defendants, all the rights which the latter might have exercised against them.

Lastly, the right of the plaintiffs against the Bank has been denied, on the ground that they have not shown that they were creditors of the Insurance Company at the time the Bank subscribed to the stock of the latter; that if the Bank was released by the Commissioners, or the Direction, from the obligation of giving the notes, or making the deferred payments, the plaintiffs could not complain, unless they showed that they were creditors when the Bank subscribed. It is useless to inquire into the weight of this objection, because it is not pretended that the release urged was granted to the Bank, either by the Commissioners or by the Direction.

Judgment affirmed.

SAME CASE—APPLICATION FOR A RE-HEARING.

One who signs an agreement to take stock in an incorporated company, thereby promises to pay the full amount of every share thus subscribed for; and an action will lie to recover it, either for the purpose of carrying on the business of the company, or of paying its debts. And where the stockholders refuse or neglect to elect Directors to manage its affairs; or elect those who will not call in the stock to pay its debts, any creditor will have an action to compel such stockholders to pay, each of whom will be responsible for the amount subscribed by him, if so much be necessary to pay the debts. The stockholders will not be allowed to throw the loss upon the creditors, either by refusing to pay for their stock, or by forfeiting it, or by dissolving the corporation by non-user or otherwise.

GARLAND, J. This case is before us, on an application for a re-hearing. In the opinion already expressed, it is not stated that two sets of interrogatories were propounded and answers given. This omission, with that of one or two other facts, perhaps not very material, make it proper to re-state the case, that, as a whole, it may appear connected.

The plaintiffs obtained a judgment against the Union Insurance Company, as drawers of a promissory note for \$1000, on which they issued an execution. This execution was received by the sheriff on the 26th of February, 1840. Two days after, the plaintiffs presented a petition to the Commercial Court, in which, after representing that they are judgment creditors of the defendants, they state that they have reason to believe the Atchafalaya Rail Road and Banking Company is indebted to the Union Insurance Company ; wherefore they pray that, according to the 13th section of the act of 1839, to amend the Code of Practice, (B. & C. Dig. 458), the said Rail Road and Banking Company may be cited to answer, under oath, the following interrogatories :

First. Are you not a stockholder in the Union Insurance Company ?

Second. Have you not been notified of a call for an instalment from said Company to pay its debts ?

Third. Are you not indebted to said Company in the amount of said instalment, or in some other, and what amount ?

Fourth. Are you not indebted to said Company in a sum sufficient to satisfy the plaintiffs' claim, as stated in the petition ?

To these interrogatories, on the 7th of March, 1840, Charles Harrod, Cashier of the Rail Road and Banking Company, answered :

First. They are stockholders in the Union Insurance Company.

Second. A call was made on the stockholders for an instalment.

Third. This Bank is not indebted to said office for said instalment, or in any other sum.

Fourth. No.

On the 13th of April, 1840, the execution issued in this case was returned *nulla bona*. On the 29th of the same month, the plaintiffs issued an *alias fieri facias* ; and on the same day filed a

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petition similar to the former, and again propounded the following interrogatories :

First. Are you not stockholders in the Union Insurance Company, and for how many shares ?

Second. How much have you paid on each share ?

Third. Does not the amount not yet paid on your stock, exceed five thousand dollars ?

To these interrogatories, the Cashier answered :

First. This Bank does own stock in the Union Insurance Company ; the number of shares, I presume, the books of the office will show.

Second. All that have been legally called for.

Third. This Bank is not indebted to said Insurance Company.

On the *alias fi. fa.* last issued, the sheriff returned, on the 16th of July, 1840, that he had " seized, in the hands of the President and Directors of the Atchafalaya Rail Road and Banking Company, the goods and chattels, lands and tenements, moneys, effects, or property of any kind, which they might have in their possession, or under their control, belonging to the defendants, to an amount sufficient to satisfy this writ, of which seizure nothing came into the hands of the sheriff. No other property found."

Some days after these answers were filed, the plaintiffs came into court, and alleged that they were false, and that they were ready to establish their falsehood. The Bank, by its counsel, joined issue on these allegations.

On the trial, the Atchafalaya Rail Road and Banking Company admitted that they were subscribers to the stock of the Union Insurance Company, for one thousand shares, and that they had paid only five dollars per share. It was also admitted, that there were other subscribers for an equal amount, who had only paid the same sum per share.

The plaintiffs had a judgment, and this appeal is taken from it.

By the third section of the act, incorporating the Union Insurance Company, it is provided : " That the subscribers to the said Company shall pay at the time of subscribing, five dollars on each share ; and give their notes endorsed to the satisfaction of the commissioners, for five dollars on each share, payable in sixty days from the date ; and for five dollars each share, payable in ninety days from the date ; and for five dollars each share, payable in four

months from the date ; and for ten dollars each share, payable in six months from the date ; and the remaining twenty dollars for each share, shall be paid or secured to be paid, at such time and in such manner, as the President and Directors of said Company shall direct ; *provided*, that the payment thereof shall be made by instalments, at such periods as shall be agreed upon by the President and Directors ; and any subscriber or stockholder who shall neglect to pay any instalment as ordered, or may be ordered by the Board of Directors, shall forfeit to the Company all previous payments, and shall cease to be a stockholder in said corporation, unless the Board of Directors, in their discretion, should determine to compel the payment of said subscription by suit."

The Rail Road and Banking Company admitted, as the Cashier had previously sworn, that they were the owners of one thousand shares of stock, and that they had only paid five dollars per share on it. The stock was fifty dollars per share, so that forty-five dollars per share were still owing. It was not proved, nor pretended, that the notes required to be given had ever been executed, although the counsel for the appellants urged that we were bound to presume so, otherwise his clients could not be stockholders. We know of no such legal presumption in favor of the appellants, nor any good reason why a presumption of the kind should be entertained. It was a fact which the appellants could have easily shown, if material to their defence. It is sufficient that the Rail Road and Banking Company admitted the ownership of the stock. If they apprehended any loss from their notes being still outstanding, it would have been well to have shown, in the first place, that the notes existed. It is now six years since the notes were required to be executed, payable in sixty, ninety, one hundred and twenty, and one hundred and eighty days. It is not pretended that they have been paid, or ever presented for payment ; and the presumption is much stronger that they were never given, than that they were. Therefore, twenty-five dollars are yet owing on each share, which the Rail Road and Banking Company are bound to pay, without any call from the Directors, the term of payment being fixed by the charter. The subscribing for the stock created the obligation to pay, and the benefits expected from it formed the consideration for the notes, which were, if ever executed, the evi-

dence of a debt; and on them, if given or on the subscription, if they were not executed, the Insurance Company has a right to enforce payment from a garnishee, as is apparent from the last clause in the third section of its charter. The subscribing for the stock created a debt, from which the stockholders cannot release themselves at pleasure, by saying that they never complied with their contract; nor can they evade the payment, by special pleading, when the creditors of the corporation call on them in a legal manner. In choosing, in our former opinion, to place the responsibility of the garnishees, upon their liability to pay the twenty dollars per share, which was not to be secured by notes, we must not be understood as giving up the ground of their being responsible for the twenty five dollars per share, which was to be so secured. We think both grounds are tenable.

A person who, with others, signs an agreement or promise to take stock in an incorporated company, thereby promises to pay the corporation the sum necessary to cover every share set opposite to his name, and an action will lie to recover it. This point has been repeatedly decided, both in England and the United States, and rests upon the plainest principles of law and justice. 6 Barn. & Cress. 341. 1 Maule & Selwyn, 569. 9 Johns. Rep. 217. 14 Ibid. 238. 16 Mass. 94. Angel on Corporations, 293. This action may be maintained for the purpose of getting in the stock to carry on the business, or to execute the purposes for which the corporation was created, and also to pay the debts it may contract.

We are, further, of opinion, that whenever the stockholders in an incorporated company neglect or refuse to elect Directors to manage its affairs, and keep it in operation, or elect persons who will not call in the stock to pay the debts which may have been contracted, the creditors will have an action to compel them to pay, and that each will be responsible for the amount subscribed, if so much be necessary to pay the debts. It is not to be permitted to any number of individuals to get up incorporated companies for insurance, banking, or other operations, and, after enabling them to get in debt, to throw the loss upon the creditors, by refusing to pay their stock, or forfeiting it, or dissolving the corporation and releasing themselves by non-user.

Shiff v. The Union Insurance Company.

As to the responsibility of the stockholders towards the creditors, we have not a shadow of doubt. As between themselves, when calls are made for payment, and their rights under the charter are to be investigated, other questions will, no doubt, arise, which it is not our purpose to examine at this time.

Re-hearing refused.

HART M. SHIFF V. THE UNION INSURANCE COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts, J. T. Slidell*, for the plaintiff.

Hoffman, for the appellants.

MARTIN, J. This case is of exactly the same nature as that brought by Cucullu and others against the same defendants, just decided. The plaintiff summoned the Atchafalaya Rail Road and Banking Company as garnishees, with the view of obtaining judgment against them for the amount which he had recovered against the defendants; and the Bank is appellant from a judgment sustaining his claim.

In their answers to the interrogatories, the Bank denied its indebtedness to the defendants, admitted its ownership of part of the stock of the Company, and averred that it had paid all the instalments called for by the Board of Directors of the Insurance Company. On this the plaintiff took a rule on the Bank, to show cause why judgment should not be given against it for the amount of the judgment, interest, and costs, recovered from the defendants. On the trial of the rule, the plaintiff introduced in evidence his judgment against the defendants, their charter, and the admission made by the Bank in the preceding case, to wit, that the Bank was a subscriber to the stock of the Insurance Company for one thousand shares, and had paid only \$5 per share, and that there are other subscribers to the stock to an equal amount, who are in the same situation, *i. e.*, have paid only \$5 per share. The counsel for the Bank has urged, in this court, that the answer to the interrogatories denies all indebtedness, that no issue was taken thereon, and that judgment is asked on the showing of

Martin v. Miller and another, &c.

answers which present no issue. The *fi. fa.* against the defendants was issued on the 22d of November, 1841, and proceedings against the garnishees were instituted on the same day. The *fi. fa.* was returned on the second Monday of January, 1842. On the merits, the case has been submitted to us on the points made in the preceding case.

The plaintiff might certainly have taken issue on the answers of the Bank, and have proceeded thereon. Instead of this he took a rule, on which the parties went to trial. On this trial the Bank might have availed itself of its answers to the interrogatories. This was not done. If it had done so, the admissions made during the trial of the rule would certainly have controlled the answers to the interrogatories. If the proceedings had, before it appeared by the sheriff's return that no property of the defendants was to be found, offered any exception to the Bank, it was one which was susceptible of being waived, and was so by not having been made below. On the merits, it is useless to repeat the reasoning by which we arrived at the conclusion on which our judgment in the preceding case was based. In both cases it is evident that the Bank were debtors to the defendants, in sums immensely exceeding the judgments obtained against the Insurance Company.

Judgment affirmed.

In the cases of *William Martin v. George S. Miller and another*, *Philip Vidichi v. Charles Guesnard*, and *The Exchange and Banking Company of New Orleans v. Daniel Treadwell Walden*, from the Parish Court of New Orleans; and of *Sidle and another v. Charles A. Luzemberg*, *John Spears v. William N. Martin*, *Benjamin Florance v. James C. Parker and others*, and *John Kellar v. John Maddin and another*, from the Commercial Court of New Orleans, the judgments of the courts below were affirmed, on appeal, in New Orleans, during the period embraced by this volume, with damages in each case as for a frivolous appeal.

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ACCESSION.

1. By the Roman law, one who made constructions on soil which he knew to belong to another, was presumed to be willing to lose his materials, and had no claim against the owner of the ground, who acquired an absolute right to whatever was erected on it. By the laws of this State, Civ. Code, art. 500, the owner of the soil has the right to have the buildings removed at the expense of the person who erected them, or to keep them on paying the value of the materials and the price of the workmanship; but, until this election be made, such works, though subject to the right of acquisition given to the owner of the soil, continue to belong to, and are at the risk of the party who erected them. *Baldwin v. Union Insurance Co.*, 133.
2. Where the defendant in a petitory action has established the value of the improvements made by him on the premises, and plaintiff seeks, under art. 500 of the Civil Code, which gives to the owner of the soil on which plantations or constructions have been made by a third person the election either to reimburse the value of the materials and the price of workmanship, or to pay a sum equal to the enhanced value of the soil, to avail himself of the privilege by paying the enhanced value, he must show the amount of such enhanced value. *Rivas v. Hunstock*, 187.

ACT, AUTHENTIC.

1. A notarial act, by which it was agreed that certain lines should form the boundary between the lands claimed by the parties thereto, not recorded in the office of the Parish Judge, is void as to third persons, or innocent purchasers without notice. *Kittridge v. Landry*, 72.
2. A direct action is not necessary to establish the falsehood of a notarial act; it may be shown collaterally. *De Blanc v. Martin*, 182.
3. A notarial act will be presumed to be correct, unless the evidence leaves no reasonable doubt of the contrary. *Ib.*

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AGENCY.

- I. *Powers of Agent, and who may act as such.*
- II. *Liability of Agent to Principal.*
- III. *Rights of Agent.*
- IV. *Responsibility of Principal to Third Persons.*

I. *Powers of Agent, and who may act as such.*

1. The power to sell or compromise, must be express and special. C. C. 2966. *Bonneau v. Poydras*, 1.
2. The dissolution of a partnership is not an act of administration, and, therefore, requires a special power. It does not come within the general powers of an agent. C. C. 2966. *Jonau v. Blanchard*, 513.
3. The same person cannot be the agent of two contracting parties in the same transaction, where their interests are in conflict; still less can he act as such, where he has a personal interest in the matter adverse to that of one of the parties. *Florance v. Adams*, 556.
4. One acting as the agent and on behalf of a partnership, of which he is a member, cannot transfer a note to himself as the agent of a third party. The transfer of a note is a contract, requiring the concurrence of two minds. *Ib.*

II. *Liability of Agent to Principal.*

5. Where an agent whose duty it was to procure insurance for his principal, neglects to do so, he will be responsible for any loss which may result from his neglect. *Strong v. High*, 103.
6. An agreement between two Banks, established in different cities, and acting as agents for each other, that "prompt advice shall be given as well of the acceptance and payment of all remittances, as of protests for non-payment or non-acceptance," will not be considered as contemplating such speedy advice as to enable the party transmitting paper for collection, to give notice of protest to endorsers after receiving advice from the party charged with the collection. *Frazier v. New Orleans Gas Light and Banking Co.*, 294.

See INSOLVENCY, 20.

III. *Rights of Agent.*

7. An agent is entitled to recover expenses incurred by him in the execution of his agency, even when he has been absolutely unsuccessful, unless it be shown that it was the intention of the parties that the principal should pay nothing in case of failure. Otherwise with a broker employed to sell a house, who, whether successful or not, is not entitled to recover money spent by him in his agency.

Blanc v. New Orleans Improvement and Banking Co., 63.

8. A broker is entitled to no compensation, unless a bargain be effected (*Ib.*); and even in that event, has no claim for the reimbursement of his expenses.

Didion v. Duralde, 163.

9. The claim of a consignee, for advances, is superior to that of an attaching creditor, where the former had received the bill of lading previous to the attachment. But proof of such advances will not defeat the attachment of the latter, who will be entitled to any surplus after payment of the advances and necessary expenses. *Park v. Porter*, 342.

10. A commission of two and a half per cent for accepting a draft or bill where the drawer has no funds in the hands of the drawee, is a fair compensation for the use of the name and credit of the latter. But where such a commission has been charged, none can be allowed for afterwards paying the draft.

Buckner v. Chapman, 360.

IV. *Responsibility of Principal to Third Persons.*

11. One who is notified that a contract has been made for him, subject to his ratification, by another pretending to have authority for that purpose, will be presumed to have ratified it, unless he repudiates it immediately after being notified thereof. *Bonneau v. Poydras*, 1.

12. Defendants advertised for sale, "the hull, spars, sails, and rigging, of the schooner Louisiana, lying high and dry on a certain island." The advertisement represented "that she was well found, her sails unbent, and her running rigging stowed below; that there was some cargo on board, which might entitle the purchaser to an advantageous salvage; and that she was left in the charge of three trusty persons." Plaintiffs purchased, and four days afterwards proceeded to the wreck, which they found at a different place from that advertised, and burnt to the water's edge. *Held*, that if the burning occurred after the day of sale, but before possession could have been taken with reasonable diligence, that defendants were liable, under arts. 2443, 2444, for the acts or neglect of the persons they announced as keeping her, and that the delay of four days was not unreasonable.

Bataille v. Firemen's Insurance Co. of New Orleans, 60.

13. A principal is not bound by the act of an agent who exceeds his authority.

Menefee v. Johnson, 274.

14. A Bank employing its regularly appointed notary to protest a note deposited with it for collection, will not be liable for his official misconduct or failure to give notice to the endorsers.

Frazier v. New Orleans Gas Light and Banking Co., 294.

15. The party insured will be responsible for any loss, occasioned by want of proper care on the part of his agents.

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- I. *From what Judgments an Appeal will lie.*
- II. *Parties to Appeal.*
- III. *Surety on Appeal.*
- IV. *Effect of Appeal.*
- V. *Evidence not in the Record.*
- VI. *Verdict and Judgment will not be disturbed, when.*

I. *From what Judgments an Appeal will lie.*

1. An order to deliver to the consignee, property seized by attachment on a vessel in which it had been shipped for the purpose of being sent out of the State for sale, on his executing bond, with security, to abide the judgment of the court, is final as to the possession of the property, and may be appealed from. *Park v. Porter*, 342.
2. A judgment may be so far final as to be subject to appeal, without being final as to the point at issue. *Ib.*
3. To entitle a party to an appeal from an interlocutory judgment, it is not necessary that the injury be absolutely irreparable; it is sufficient that it may become irreparable in consequence of the final action of the court. *Ib.*
4. No appeal, suspensive or devolutive, will lie from a judgment, rendered in the progress of a suit by the wife against her husband to recover the administration and possession of her paraphernal property which had been sequestered on the execution of a bond with security, ordering her to be put in possession of the sequestered property, or from one overruling a motion to set aside the sequestration. They are interlocutory judgments, from which no appeal will lie unless they work irreparable injury. The bond protects the husband from injury. *State v. Judge of the First District*, 395.
5. Where a verdict had been found, but no final judgment rendered, and defendant appealed on the refusal to grant a new trial, the appeal must be dismissed. *Walton v. Louisiana State Marine and Fire Insurance Co.* 562.
6. Plaintiff having issued execution against defendants, took a rule on the latter to show cause why they should not be ordered to produce their books, that plaintiffs might inspect them. The rule was made absolute, and the

sheriff ordered to seize the books. On an application by defendants for a writ of prohibition : *Held*, that if they had sustained or apprehended irreparable injury, their remedy was by appeal.

State v. Judge of the Commercial Court, 566.

II. Parties to Appeal.

7. The authorization required to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than her own allegations, or those of her counsel. *Gorman v. Berghans*, 282.
8. To entitle one, not a party to the cause, to an appeal from the judgment, under art. 571 of the Code of Practice, he must have a pecuniary interest and be aggrieved. Where the interest is not apparent on the record, the case will be remanded to ascertain it. *Succession of Henderson*, 391.

III. Surety on Appeal.

9. The surety in an injunction bond may be surety for his principal on an appeal by the latter from a judgment dissolving the injunction, and condemning principal and surety, *in solido*, to the payment of damages and costs. *Greiner v. Prendergast*, 235.
10. No appellant but the State is exempt from the law requiring surety on granting an appeal, whether devolutive or suspensive. *Ib.*
11. The surety in an appeal bond, who pays the amount of the judgment obtained against his principal, will, under art. 2157 of the Civil Code, be legally subrogated to all the rights of the plaintiff whose claim he has satisfied, and may, on a rule to show cause being made absolute, take out a *fi. fa.* against the bail in the suit, whose liability has been fixed, for the whole amount paid by him. *Howe v. Frazer*, 424.
12. A person cannot be received, in his private capacity, as surety on an appeal from a judgment against him as the executor or curator of a succession, though the succession itself be solvent. *State v. Judge of Court of Probates of New Orleans*, 449.
13. Where the security, given within the ten days to obtain a suspensive appeal, and accepted by the judge, is afterwards rejected, the appeal should not be dismissed without allowing the party time to procure other security. *Ib. Re-hearing*, 452.
14. The right of inquiring into the sufficiency of the surety on an appeal bond, and of deciding whether the appeal shall be suspensive or devolutive, is exclusively within the province of the court from which the appeal is taken. The sufficiency of the security may be tried, on motion ; and if an error be committed by the court, in refusing to make the appeal suspensive and authorizing the issuing of execution, the remedy is by writ of prohibition. *Stanton v. Parker*, 550.
15. When the surety becomes insolvent after the appeal is brought up, it is the same as if no security had been given ; and such insolvency must be inquired into before the court which granted the appeal. Though divested of all jurisdiction as to the case itself, it is empowered to decide whether execution may be taken out, notwithstanding the appeal. *Ib.*

IV. *Effect of Appeal.*

16. Defendant commenced an action to rescind a contract of loan for \$200,000, the amount of which was secured by mortgage, and obtained an injunction to restrain the plaintiffs from summary proceedings under the mortgage until the further order of court. The injunction having been dissolved, he and his sureties in the injunction bond took a suspensive appeal, giving security in the sum of \$6000. Plaintiffs thereupon applied for an order of seizure and sale, which was refused, on the ground of the pendency of the appeal from the order dissolving the injunction. On appeal by the plaintiffs from this judgment: *Held*, that a suspensive appeal having been taken from the judgment of dissolution, the injunction was thereby maintained until the final decision of the appellate court.

City Bank of New Orleans v. Walden, 181.

17. No proceedings can be had in an inferior court, in relation to the subject matter of a case pending in the Supreme Court, until the expiration of three judicial days after judgment has been pronounced by the latter, within which time a re-hearing may be granted, and the judgment amended or entirely changed. *Bedford v. Saunders*, 285.

18. An attachment having been levied on the property of an absconding debtor, certain creditors, on the same day, prayed for a forced surrender of his property, and obtained an order for a meeting of creditors and a stay of proceedings. The proceedings for a forced surrender having been set aside on appeal, on account of the insufficiency of the petition, other creditors, not parties to the proceedings for a surrender, procured an attachment from the lower court on the day on which the judgment was pronounced by the appellate tribunal, which was levied on the property of the debtor. The property seized under the first attachment proving insufficient, the creditors who sued it out, caused a *fi. fa.* to be issued on the judgment which they had in the meantime obtained, and seized the property which had been attached on the day on which judgment was pronounced on the appeal. *Held*, that the seizure under the *fi. fa.* was good, and that the second attachment, having been issued before the expiration of three judicial days from that on which the judgment was pronounced, was null. *Ib.*

V. *Evidence not in the Record.*

19. An act of sale stipulated that the notes given for the price were to remain with the Notary, until a mortgage existing on the property should be cancelled. Plaintiffs obtained an order of seizure and sale, without having produced any evidence of the cancelling of the mortgage. On an appeal by the defendant, and assignment of the want of evidence of the cancelling as error apparent on the face of the record, plaintiffs offered a certificate of the Recorder of Mortgages to show that the mortgage had been cancelled. *Held*, that the cancelling not having been alleged or proved in the inferior court, no evidence could be offered to prove it on the appeal.

Petit v. Grandmont, 283.

20. Evidence, presented by one of the parties, but not contained in the re-

cord, will not be permitted, under any circumstances, to influence the decision of the court. *Stillwell v. Bobb, Re-hearing*, 327.

VI. *Verdict and Judgment will not be disturbed, when.*

21. An error into which the jury have fallen in fixing the period from which interest is allowed, which appears from the facts found by them and from the records of the suit, may be corrected by moving for a new trial, or by an application to the judge. Where such error does not exceed the fraction of a dollar, and no attempt has been made to correct it below, the judgment will not be disturbed on appeal. *Mullen v. Miller*, 23.
22. The verdict of a jury will not be disturbed, unless manifestly erroneous. *De Blanc v. Martin*, 82.
23. The decision of the lower court as to the admission or rejection of a witness, not introduced at the regular time, will be affirmed, unless the discretion allowed in such cases appears closely to have been incorrectly exercised. *Pilié v. Kenner*, 95.

ARREST.

The act of 28 March, 1840, abolishing imprisonment for debt, by relieving bail from the obligations they had entered into, deprived them of any right over their principal. *Ex parte Lafonta*, 495.

ATTACHMENT.

1. Plaintiff attached certain cotton as the property of defendants. Proof that it had been previously sold by defendants to intervenor, who had given a note for the price, which was protested at maturity, and still unpaid. The sheriff's return showed that he had "attached seventy bales of cotton, which was subsequently released on the execution of a bond by the consignees." Urged, on behalf of plaintiffs, that though the attachment could not hold the cotton, it was good as to defendants' privilege as vendors. *Held*, that the return showed that no such right had been attached; and that the lien, if any existed, attached to the cotton, which had been sold. *Slocumb v. Real Estate Bank of Arkansas*, 92.
2. When the owner of property has lost all control over it, and cannot change its destination, it cannot be attached by his creditors. *Urie v. Stevens*, 251.
3. To recover damages for an illegal attachment, or for the hire of slaves seized by attachment, it is not necessary to put the attaching party in default. But where an attachment has been levied on slaves, and they have, with the consent of the debtor, remained in the hands of the plaintiff in attachment, to enable the former to recover their value, the latter must be put in default otherwise than by the institution of suit. *Cox v. Robinson*, 313.
4. Where a plaintiff voluntarily abandons his attachment, he renders himself and his surety responsible in damages; and where such attachment has been set aside by order of court, it is *prima facie* evidence that it was illegally issued, and that damages to some extent have been sustained. *Ib.*

5. The possession of a bill of lading, like that of a bill of exchange, is *prima facie* evidence of title ; and, in the absence of contradictory evidence, will entitle an intervening claimant to bond property seized by attachment.
Park v. Porter, 342.
6. The claim of a consignee, for advances, is superior to that of an attaching creditor, where the former had received the bill of lading previous to the attachment. But proof of such advances will not defeat the attachment of the latter, who will be entitled to any surplus after payment of the advances and necessary expenses. *Ib.*
7. An uninterrupted residence of one year within the State, is necessary, under the acts of 7th March, 1816, and 16th March, 1818, to acquire a domicile in this State ; and until so acquired, a party may be sued by attachment as a non-resident. It is not necessary that he should have remained the whole time within the State, provided that, during any temporary absence, he retained an office or room as his residence, and left some authorized agent to represent him. *State v. Judge of Court of Probates of New Orleans*, 449.
8. The execution of an attachment bond, is no waiver of the party's right to show that the facts on which the attachment was obtained are unfounded, or that the property attached does not belong to the defendant.
Quine v. Mayes, 510.
9. The sureties on a bond given for the release of property attached, the condition of which is that they shall satisfy whatever judgment may be rendered in the suit, though not parties to the action, may plead the nullity of the judgment, when called upon to satisfy it. Their undertaking was, to satisfy any judgment legally obtained. When a judgment is absolutely null, any one having the least interest in opposing its effect, may have such nullity pronounced. *Ib.*

See APPEAL, 18.

ATTORNEY AT LAW.

1. Unless specially empowered by the husband, an attorney at law cannot authorize the wife of his client to do any act for which the authorization of the husband is required. *Gorman v. Berghans*, 282.
2. The act of 22d March, 1826, relative to attorneys at law, applies only where the money belonging to a client has been withheld from him. It is inapplicable, where the latter seeks to obtain the control of a note which had been received by the attorney. *Oakey v. Duncan*, 349.
3. Where no special contract has been made, the compensation of advocates and attorneys must be regulated, in a great degree, by the nature of their services. The difficulties of the case, the amount in controversy, and other attending circumstances, must be considered, in connection with the physical and mental labor, and the responsibility incurred.

Hunt v. Orleans Cotton Press Co., 404.

ATTORNEY IN FACT.

See AGENCY.

AUCTIONEER.

See SALE, 37.

BAIL.

1. One who becomes bail for another, on a guaranty from a third person to indemnify him for any loss he may be subjected to in consequence, is under no obligation to notify the latter of any steps taken to render him liable.
Fisk v. Comstock, 25.
2. Bail may coerce the surrender of their principal. *Ib.*
3. The act of 28 March, 1840, abolishing imprisonment for debt, by relieving bail from the obligations they had entered into, deprived them of any right over their principal. *Ex parte Lafonta*, 495.
4. Bail may arrest the principal out of the State in which the bail bond was given, and even after the latter has obtained a stay of proceedings. *Ib.*
5. Bail, when authorized to arrest the principal, may obtain, on the production of the bail piece, the assistance of a sheriff or constable, or an order from a court or magistrate to arrest such principal. *Ib.*

BAILMENT.

See CARRIERS. PLEDGE.

BANK.

1. A Bank employing its regularly appointed notary to protest a note deposited with it for collection, will not be liable for his official misconduct or failure to give notice to the endorsers.
Frazier v. New Orleans Gas Light and Banking Co., 294.
2. The third section of the act of 14th March, 1839, requiring the Banks in the city of New Orleans to settle and pay in gold and silver the balances due to each other, every Monday, imposed no duty not previously required by law; and if the party in whose favor it was stipulated chose to waive the right, the State cannot complain, without showing some injury resulting therefrom to the community.
State v. New Orleans Gas Light and Banking Co., 529.
3. Since the act of 14th March, 1839, relieving the Banks of this State from the forfeiture of their charters occasioned by their suspension of specie payments, no Bank can suspend specie payments, even for a day, without exposing its charter to forfeiture. *Ib.*

See CASHIERS OF BANKS. CORPORATIONS, 4.

BANK NOTE.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 7, 20, 21.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Acceptance.*
- II. *Transfer.*
- III. *Protest for Non-payment.*
- IV. *Action on.*
- V. *Defence to Action on.*

I. *Acceptance.*

1. To construe a promise to accept a bill to be afterwards drawn, into an actual acceptance, so as to authorize a suit by the holder of the bill, as if accepted, the bill must be described in terms not to be mistaken. The description must be sufficient to identify the bill when sued on, and such as can apply to no other bill; it must result from the promise itself, and cannot be aided by any statement on the face of the bill. *Von Phul v. Sloan*, 148.
2. The evidence necessary to support an action on a bill as an accepted bill, and on a breach of promise to accept, is materially different. To maintain the former, the promise must be applied to the particular bill alleged to have been accepted; in the latter case, the evidence may be of a more general character, and the authority to draw be collected from circumstances, and extended to all bills coming within the scope of the promise. *Ib.*
3. The acceptance of a bill of exchange or promissory note, though after sight of an endorsement, does not admit the signature of the endorser. The acceptor looks only to the signature of the drawer, and that alone he is precluded from afterwards disputing. *Robbins v. Lambeth*, 304.
4. Plaintiffs, endorsees of a bill of exchange, alleged to have been burnt, drew on the acceptors for the amount, payable at the maturity of the original bill. On presentation of the draft, the latter told plaintiffs' agent that "there would be no difficulty about it," which led the agent to conclude that the draft would be paid. *Held*, that these words, which probably referred only to the embarrassment resulting from the loss of the bill, did not, under the circumstances, amount to an absolute acceptance of the draft, nor waive the acceptors' right to be satisfied of the genuineness of the endorsement of the original bill. *Ib.*
5. An inconsiderate or hasty promise to accept a bill may, perhaps, be revoked, where no third person has, in the meantime, been affected by it. *Ib.*
6. A promise to accept a bill, if the amount exceed five hundred dollars, must be proved by at least one witness, and by other corroborating circumstances. These circumstances must be established *aliunde*, and not by the witness himself. *Ib.*

II. *Transfer.*

7. The half of a bank note, cut in two, is not negotiable. The negotiability of the note can only be restored by re-uniting the parts.

Murdock v. Union Bank of Louisiana, 112.

8. Where a bill of exchange is assignable only by endorsement, one who obtains possession of it by a forged endorsement, acquires no interest, though ignorant of the forgery; and the original holder may recover of the acceptor, though the latter have paid the amount of the bill to the person in possession under such endorsement, unless it be shown that such payment was made through the fault of the original holder; but the fault must be shown, and the burden of proof is upon the party who justifies the payment.

Jackson v. Commercial Bank of New Orleans, 128.

9. Action by the endorsee of a draft, drawn by the Trustees of a College, on the Treasurer of the State, for a portion of the annual appropriation for the use of the College, payable to J. N., or order, and endorsed "J. N., Treasurer." Plaintiff having paid part of the draft to J. N. in cash, and the balance by acceptances of drafts drawn on him by a firm of which J. N. was a partner, and J. N. having shortly after become insolvent, on an answer by the Trustees, cited in warranty, alleging that plaintiff had received the original draft, knowing that it had been entrusted to the Treasurer of the College for collection for the use of the College, and not to be negotiated: *Held*, that the draft was, on its face, an official paper, and that the plaintiff having connived with J. N. to divert its amount from the use of the College, could not recover in an action against the Treasurer of the State as acceptor, or the College as drawers of the draft. *Hardy v. Gardere*, 154.

10. Where notes given for the price of property, sold by one in insolvent circumstances for the purpose of giving an undue preference to certain creditors, have, in the ordinary course of trade, come into the possession of third parties, without notice of the nullity of the sale, the latter will be protected.

Robinson v. Shelton, 277.

11. It is essential to the validity of a pledge, as to third persons, that notes or other obligations payable to bearer or order which form the subject of the pledge, should be endorsed by the payee or pledgor. C. C. 3128. *Ib.*

12. The possession of a promissory note, payable to order and endorsed in blank, is *prima facie* evidence of title, the property passing by delivery. No other transfer is necessary to entitle a party to avail himself, *via ordinaria*, of a mortgage given to secure its payment; but to proceed *via executiva*, the mortgage must be transferred by an authentic act.

Fitzwilliams v. Wilcox, 303.

13. One acting as the agent and on behalf of a partnership of which he is a member, cannot transfer a note to himself as the agent of a third party. The transfer of a note is a contract, requiring the concurrence of two minds. *Florance v. Adams*, 556.

III. *Protest for Non-payment.*

14. Notice of protest, left with a black servant in the office of the person notified, is sufficient. *Bank of the United States v. Merle*, 117.
15. Notice of protest need not be sent by the mail which leaves on the day of the protest; but it must be deposited in the post office in time to go by the first mail of the succeeding day. *Ib.*
16. A note dated the thirty-first of September, will be considered as having been made on the thirtieth of that month; and where such a note was payable at six months, it will be due on the thirtieth of March; and must be protested on the second of April following. *Wagner v. Kenner*, 120.
17. The computation of the time of maturity of a bill or note, payable one or more months from date, must be made according to the Gregorian calendar, *i. e.* from the day of the month on which it bears date to the corresponding day of the month of its maturity, without reference to the number of days in the months; and such has been the custom in this city. Thus, a note drawn on the 28th, 29th, 30th, or 31st of January, payable one month from date, will be due on the 28th of February, if the year be not bissextile, because the month of February has no other corresponding day; but a like note dated the 28th or 29th of February, will be due on the 28th or 29th of March. Such a note drawn on the 31st March, will be due on the 30th of April; but if dated on the 30th of April, it will be due on the 30th, not the 31st of May. *Ib.*
18. Art. 2055 of the Civil Code, which provides that, "where the term referred to in a contract consists of one or more months, the parties, if they have not made any other explanation, shall be deemed to have meant months in the order in which they stand in the calendar after the date of the obligation, and with the number of days such months respectively have," does not apply to bills of exchange or promissory notes. *Ib.*
19. A Bank employing its regularly appointed notary to protest a note deposited with it for collection, will not be liable for his official misconduct or failure to give notice to the endorsers.
Frazer v. New Orleans Gas Light and Banking Co., 294.

IV. *Action on.*

20. A Bank will be responsible for the amount of a note issued by it, on proof of its loss and of the contents of the note. So, on the production of the half of a note, where the absence of the other half is fairly accounted for, the Bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half.
Murdock v. Union Bank of Louisiana, 112.
21. In an action by the holder of the half of a bank note, where the half on which the president's signature is usually affixed has been lost, the signature of the president need not be proved. It will not be presumed that notes were ever issued without the signature of that officer. *Ib.*
22. Interest will be allowed on the amount of the damages on protested bills or notes. *Bank of the United States v. Merle*, 117.

23. The holder of a negotiable instrument is not required to prove the consideration which he gave for it, unless specially called upon by the answer so to do. *Davidson v. Keyes*, 254.
24. The plea of the general issue in an action against the acceptors of a bill of exchange, admits their signature, which is all that the plaintiff is bound to prove. *Carmena v. Peyroux*, 303.
25. The demand to be made on a note payable at a particular place, cannot be assimilated to the amicable demand required by the Code of Practice. The want of the latter must be pleaded to put the plaintiff on the proof of it, and a failure to establish it does not prevent his obtaining judgment, but only subjects him to the payment of the costs incurred before the appearance of the defendant. The former must be alleged and proved, or the plaintiff cannot recover. *Stillwell v. Bobb*, 327.
26. Cases of *Wetmore & Co. v. Merrifield*, 17 La. 513, and *Booraem v. Merrifield*, Ib. 594, overruled, so far as they go to establish that in an action against the drawer of a bill or maker of a note, payable at a particular place, proof of a demand at such place is not necessary, where want of amicable demand has not been pleaded. Ib.
27. The holder of a note given for the price of a slave, will be entitled to interest from maturity, though the note contained no stipulation to that effect, and was not protested. C. C. 2531, 2532. *Gay v. Kendig*, 472.

V. Defence to Action on.

28. Action against defendant as drawer of certain notes and endorser of others. Plea of prescription, and proof of promise by defendant, within the time necessary to prescribe, to give his notes for the debt, payable at a short time; but no evidence of notice of the protest of the notes on which he was endorser, nor that he was aware of his discharge at the time of the promise. Held, that the defendant was bound for the notes of which he was drawer, but discharged as to those on which he was endorser. To render promises to pay binding on an endorser, who has been discharged, it must be proved that he was aware of his discharge, at the time of the promise.
Tomes v. Montanye, 158.
29. A balance due on an unsettled account cannot be pleaded in compensation to an action on a promissory note; nor in reconvention, when unconnected with the plaintiff's claim. It must be sued for in a direct action.
Jonau v. Ferrand, 216.
30. The acceptor of a bill has no right to inquire into the consideration between the drawer and payee, or between the latter and a subsequent endorsee. If he pay the bill, he cannot be affected by any want or failure of consideration which the drawer or payee may set up.
Davidson v. Keyes, 254.
31. It is no defence to an action on a bill drawn under an unconditional authority, to allege that the authority should have been used in a particular way. Though the holder of the letter of credit abuse the confidence reposed in him, by applying it to purposes not contemplated or improper, the

party who gave the letter cannot complain of the acts of one whom he trusted with an unconditional authority. *Ib.*

BILL OF LADING.

The possession of a bill of lading, like that of a bill of exchange, is *prima facie* evidence of title; and, in the absence of contradictory evidence, will entitle an intervening claimant to bond property seized by attachment.

Park v. Porter, 342.

BUILDER.

See LEASE, 1. 2.

CALENDAR, GREGORIAN.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 17.

CARRIERS.

1. The master and owners of a vessel are not responsible for damage to the cargo occasioned by the perils of the sea, where no proof is adduced of want of care in stowing. *Lemaitre v. Merle*, 402.
2. As a general rule, where goods are acknowledged to have been received in good order, and are delivered in bad, the carrier will be responsible; but he may show that the damage arose from causes which existed before the bailment, or from the defects of the thing itself.

McIntosh v. Gastenhofer, 403.

CASHIERS OF BANKS.

The authority given by law to the Cashiers of Banks to execute acts of pledge, confers on those officers only the powers of Notary Publics in relation to those contracts; and none of the forms essential to the contract can be dispensed with. *Robinson v. Shelton*, 277.

CITATION.

Service of citation on any member of a commercial partnership, will be binding on the rest. *Byrne v. Hooper*, 229.

CLINTON AND PORT HUDSON RAIL ROAD COMPANY.

The provisions of the second section of the act of 26th March, 1842, directing all judicial proceedings by individuals against the Clinton and Port Hudson Railroad Company to be stayed, must be understood as suspending such proceedings, pending a suit by the State for the forfeiture of its charter, in order that no one creditor may gain an undue advantage over the rest.

Such a temporary stay of proceedings, does not impair the obligation of contracts. It is a conservatory measure only. Otherwise, were the clause interpreted as directing a stay of all proceedings from the promulgation of the act for an indefinite period, upon the mere authority of the legislature.

State v. The Judge of the Third District, 307.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Civil Code of 1808.*

II. *Civil Code.*

III. *Code of Practice.*

I. *Civil Code of 1808.*

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— III, Tit. I, arts. 21, 22. Representation in the collateral line. *Wherry v. Bell*, 225.

—, Tit. V, art. 97. Powers of wife separated in person or property. *Bonneau v. Poydras*, 1.

—, Tit. XIX, art. 77. Privilege of vendor. *Monrose v. His Creditors*, 280.

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8. Laws not to operate retrospectively. *Succession of Henderson*, 391.

10. Form and effect of written instruments—by what law governed. *Succession of Senac*, 258.

44, 45. Domicil—proof of intention to change. *State v. Judge of Cort of Probates of New Orleans*, 449.

46. Domicil—effect of accepting a temporary office. *Walden v. Canfield*, 446.

48. Domicil of minor. *State v. Judge of Court of Probates of New Orleans*, 418.

123. Married woman—appearance in court by. *Dussumier v. Coiron*, 368.

125. Powers of married woman separated in bed and board. *Bonneau v. Poydras*, 1. *Dussumier v. Coiron*, 368.

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379. Emancipated minor engaged in trade. *Jonau v. Blanchard*, 513.

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- 1648, 1649. Opening and proof of will. *Succession of Robert*, 427.
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1676. Commissions of executor. *Succession of De Armas*, 445.
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- 118. Married woman—action by. *Dussumier v. Coiron*, 368.
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- 172. Petition, to contain what. *Cox v. Robinson*, 313.
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- 566. Appeal from interlocutory judgments. *State v. Judge of First District*, 395.
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- 941. Testaments—originals where to be kept. *Succession of Robert*, 427.
- 1003. Succession, petition of heirs to be put in possession of. *Tait v. Lewis*, 351.

COMMERCIAL LAW OF THE UNITED STATES.

The laws of Spain were not abrogated by the transfer of the territory of Or-

leans to the United States ; but the commercial law of the latter became, by that transfer, the law of the territory of Orleans. *Wagner v. Kenner*, 120.

COMPENSATION.

Where two persons are indebted to each other, compensation takes place from the moment the two debts co-exist. They extinguish each other, by the mere operation of law, to the amount of their respective sums.

Wood v. Boyers, 130.

See PLEADING, 24, 27.

COMPROMISE.

The power to compromise, must be express and special. C. C. 2966. *Bonneau v. Poydras*, 1.

CONFIRMATIVE ACTS.

See CONTRACT, III.

CONFLICT OF LAWS.

See DONATIONS MORTIS CAUSA, 1. 3. 5. 6. 13. 14. 16.

CONSIGNEE.

See AGENCY, 9.

CONTINUANCE.

To entitle a party to a third continuance on the ground of the absence of the same witness, he should show the materiality of the testimony, and such extraordinary diligence as to satisfy the court that it was absolutely impossible to procure the evidence. *Gay v. Kendig*, 472.

CONTRACTS.

- I. *Consent necessary to Form, and Stipulations Pour Autrui.*
- II. *Illegal Contracts.*
- III. *Confirmation.*
- IV. *Avoidance.*
- V. *Putting in Default.*
- VI. *Damages for Non-Performance.*

I. *Consent necessary to Form, and Stipulations Pour Autrui.*

1. The grant by the legislature of a privilege to raise money by lottery, without any limit as to time, may be restricted by a subsequent law, before any rights have been acquired under the first. The permission to draw a

lottery is not, *per se*, a contract; and until it has been accepted, and rights have been acquired under it, is entirely within the control of the legislature.

Davis v. Caldwell, 271.

2. A stipulation that a certain sum shall be paid to a third person, towards the extinguishment of a debt due to him from one of the parties to the contract, is not a *stipulation pour autrui*. It is for the exclusive benefit of the stipulating party. *Tiernan v. Martin*, 522.

II. *Illegal Contracts.*

3. A subscription by a municipal corporation, to the stock of an incorporated company, though unauthorized by the charter of the municipality, will be binding on it if subsequently sanctioned by the legislature.

First Municipality of New Orleans v. Orleans Theatre Co., 209.

4. The court will not lend its aid to settle disputes relative to contracts or transactions reprobated and forbidden by law. It will notice, *ex officio*, the illegality of the subject. *Davis v. Caldwell*, 271.

III. *Confirmation.*

5. The partial execution of an obligation against which an action of nullity, or rescission would lie, subsequently to the period at which it might have been validly confirmed or revoked, if voluntary, is a tacit confirmation. C. C. 2252. *Bonneau v. Poydras*, 1.
6. One who is notified that a contract has been made for him, subject to his ratification, by another pretending to have authority for that purpose, will be presumed to have ratified it, unless he repudiates it immediately after being notified thereof. *Ib.*

IV. *Avoidance.*

7. A contract will be deemed to have been made in fraud of creditors, where the obligee knew that the obligor was in insolvent circumstances, and the contract gives to the obligee, if a creditor, any advantage over the other creditors of the obligor. It will not be necessary to establish positive knowledge in the obligee of such insolvency; proof of circumstances tending to produce a strong impression that he was aware of it, will suffice.

De Blanc v. Martin, 38.

8. A contract, made in good faith, cannot be annulled, though it prove injurious to creditors; nor can a contract, though made in bad faith, be rescinded, unless it operate to their injury. C. C. 1973.

Taylor v. Whittemore, 99.

9. By the laws of this State, a contract tainted with usury is voidable only as to the usurious interest, and valid as to the principal.

Walden v. City Bank of New Orleans, 166.

10. An offer of restitution must be proved, to maintain an action of rescission. *Ib.*
11. A stockholder in a company cannot avail himself of the misbehavior of

the corporation, in not investing its capital stock according to the charter, to avoid his own contract.

First Municipality of New Orleans v. Orleans Theatre Co., 209.

See ACT, AUTHENTIC, 2. INSOLVENCY, 10.

V. Putting in Default.

12. To recover damages for an illegal attachment, or for the hire of slaves seized by attachment, it is not necessary to put the attaching party in default. But where an attachment has been levied on slaves, and they have, with the consent of the debtor, remained in the hands of the plaintiff in attachment, to enable the former to recover their value, the latter must be put in default otherwise than by the institution of suit.

Cox v. Robinson, 313.

13. Putting the defendant *in mora*, is a condition precedent to the recovery of damages for a passive violation of a contract. Such damages are only due after the debtor has been put in default, and the default must be alleged and proved; nor can evidence be received to prove a demand, where it has not been alleged in the petition. *McMaster v. Brander*, 498.

VI. Damages for Non-Performance.

14. The master of a ship which arrived at New Orleans, during an epidemic yellow fever, bound to Natchez, contracted, for a fixed price, with the owners of a steamer, to tow his vessel to the latter place, and to start from New Orleans on the evening of the succeeding day. The steamer could not be got ready sooner. Influenced by the apprehension of his passengers for their safety, the master notified the owners of the steamer in the evening of the day on which the contract was made, that he should be compelled to leave in tow of another boat which could start at once. In an action on the contract: *Held*, that from the peculiar circumstances of the case, plaintiffs were entitled to recover only the amount of damage actually sustained, and not the whole amount of profit which they might have derived from the performance of the contract. *Glover v. McAllister*, 161.

See CLINTON AND PORT HUDSON RAIL ROAD COMPANY.
CORPORATIONS, 7.

CORPORATIONS.

1. A subscription by a municipal corporation, to the stock of an incorporated company, though unauthorized by the charter of the municipality, will be binding on it if subsequently sanctioned by the legislature.

First Municipality of New Orleans v. Orleans Theatre Co., 209.

2. A stockholder in a company cannot avail himself of the misbehavior of the corporation, in not investing its capital stock according to the charter, to avoid his own contract. *Ib.*

3. An act of incorporation may be forfeited by misuse or abuse. It is a tacit condition of such a grant, that the grantees shall act up to the end or design for which they were incorporated; and where they do not, the rights and privileges granted may be withdrawn. But the misuse or abuse must be first judicially ascertained.

State v. New Orleans Gas Light and Banking Co., 529.

4. Banks, insurance, canal, bridge, and turnpike companies, the stock of which is owned by private individuals, are essentially private corporations. *Ib.*
5. The existing law of the State forms as much a part of the contract in every act of incorporation, so far as it is applicable, as it does of every contract between individuals. *Ib.*
6. The tenth title of the first book of the Civil Code relative to corporations, applies to every charter granted since its adoption, unless there be something in the latter repealing or suspending its provisions. *Ib.*
7. One who signs an agreement to take stock in an incorporated company, thereby promises to pay the full amount of every share thus subscribed for; and an action will lie to recover it, either for the purpose of carrying on the business of the company, or of paying its debts. And where the stockholders refuse or neglect to elect Directors to manage its affairs, or elect those who will not call in the stock to pay its debts, any creditor will have an action to compel such stockholders to pay, each of whom will be responsible for the amount subscribed by him, if so much be necessary to pay the debts. The stockholders will not be allowed to throw the loss upon the creditors, either by refusing to pay for their stock, or by forfeiting it, or by dissolving the corporation by non-user or otherwise.

Cucullu v. Union Insurance Co., 573.

COURTS.

I. Courts generally.

II. Supreme Court.

III. City Court of New Orleans.

I. Courts generally.

1. Where property in the hands of a judicial sequestrator, has been seized under process from another court than that which issued the sequestration, the former tribunal may pronounce upon the validity of the seizure, though it have no power to order a release of the sequestration.

Bank of Alabama v. Hozey, 150.

2. An action for the recovery of goods claimed by plaintiff as his property, which had been surrendered by an insolvent, against one who holds them as the syndic of the creditors of the insolvent, must be brought before the court in which the proceedings in insolvency are pending, and must be tried contradictorily with the creditors. Otherwise, were defendant sued in his private capacity for damages for unlawfully taking possession of the pro-

perty of the plaintiff; such an action may be brought before any court of competent jurisdiction. *Clossman v. Barbancey*, 346.

3. Where several courts have concurrent jurisdiction of actions against the sureties of a public officer, no one of them can condemn the sureties to bring into court the amount for which they may be ultimately responsible, and discharge them from further liability. The creditors cannot be compelled to come into that tribunal for redress. The judgment should be only for the amount due to the plaintiff.

See APPEAL, 14. 15. 17. 18.

II. Supreme Court.

4. The answer to a rule to show cause taken against the judge of an inferior court, must be in writing, and filed with the clerk of the Supreme Court. No answer in person, or oral discussion will be listened to, except from the parties interested, or their counsel.

State v. Judge of Court of Probates of New Orleans, 418.

III. City Court of New Orleans.

5. Under the act of 10th March, 1838, sect. 4, the Presiding Judge of the City Court of New Orleans has, within the city, exclusively of justices of the peace or of the associate justices of that court, original jurisdiction of all actions, for whatever amount, by landlords against their tenants, for the possession of real property. *Kennedy v. Downey*, 284.

CURATOR.

See SUCCESSIONS, I.

DAMAGES.

The plaintiff in a petitory action, who has reasonable ground to believe that he has good cause of action, will not be liable to damages on discontinuing or losing his case. *Walden v. Peters*, 331.

See ATTACHMENT, 3. 4. CONTRACTS, 13. 14. INJUNCTION, 2. 3.
5. 6. INTEREST, 1. SHERIFF, 3.

DOMICIL.

1. A domicile of choice can only be acquired by one who is *sui juris*; consequently, it cannot be acquired by a lunatic or minor.

Succession of Robert, 427.

2. Case of *Gravillon v. Richard's Executor et al.*, 13 La. 293, overruled, so far as the *dictum*, that "as soon as the will of making a permanent establishment in the country is combined with the fact of residence, the residence, even for a few days, fixes the domicile," applies to the acquisition of a residence in this State.

State v. Judge of Court of Probates of New Orleans, 449.

3. An uninterrupted residence of one year within the State, is necessary, under the acts of 7th March, 1816, and 16th March, 1818, to acquire a domicile in this State; and until then, a party may be sued by attachment as a non-resident. It is not necessary that he should have remained the whole time within the State, provided that, during any temporary absence, he retained an office or room as his residence, and left some authorized agent to represent him. *Ib.*
4. One who left the State to discharge the duties of a Senator of the United States, and who, on resigning, was made a member of the President's Cabinet, and subsequently a Foreign Minister, will not be considered as having lost his domicile in this State, where no act has been done evincing any intention to acquire a new domicile (C. C. 46); and prescription will run against him, as if actually within the State. *Walden v. Canfield*, 466.

See MINOR I.

DONATIONS MORTIS CAUSA.

1. The capacity to dispose of real property must be determined by the *lex rei sitæ*. *Bonneau v. Poydras*, 1.
2. By the laws of France the widow becomes the tutrix of her minor child immediately after the death of her husband, and needs no letters of tutorship to act as such; and, by the same laws, she is entitled to the enjoyment of all the property of her child, until he reach the age of eighteen, or be emancipated. A widow, residing in France, may oppose, in the courts of this State, the homologation of the will of her husband, and stand in judgment for her child. *Succession of Senac*, 258.
3. The testator, a resident of Louisiana, made an olographic will on the 8th of May, 1836. On the 10th of the same month, he married; and on the next day sailed, with his wife, for France, intending to reside permanently in that country. On the 10th of April, 1837, a child was born of the marriage, and in August, 1838, the testator died. *Held*, that under arts. 483, and 10, of the Civil Code, the will having been made in this State, its validity must be tested by the laws of Louisiana, and not by those of France. *Ib.*
4. A will is not revoked, under the laws of France, by the subsequent birth of a child. *Aliter*, in this State. Civ. Code, art. 1698. *Ib.*
5. The only exception to the rule laid down in article 483, of the Civil Code, "that persons who reside out of the State cannot dispose of property they possess here, in a manner different from that prescribed by its laws," is to be found in the 10th article of the Code; and it is only under the conditions mentioned in that article, that foreign laws are permitted to operate in the disposition of property in this State. *Ib.*
6. The meaning of the third paragraph of art. 10, of the Civ. Code, is, that the rule, that the effect of acts passed in one country to be executed in another must be regulated by the laws of the latter, does not hold in relation to testaments and donations *mortis causa*, where the testator or donor resided abroad when the act was executed and at the time of his death. It is only when

both these circumstances occur, that he will be considered as having made his will with reference to the laws of his domicile. *Ib.* 262.

7. Where a remunerative donation exceeds the disposable portion, the donee or legatee is bound to prove the value of his services. If proved to be equal to or greater than the bequest, no reduction can be made; otherwise, it must be reduced to the estimated value of the services. C. C. 1500, 1512. But where such donation does not exceed the disposable portion, the declaration of the testator as to the services and their value, will be conclusive on the heirs, and no proof will be required from the legatee. In the latter case, the remunerative disposition must be viewed as an ordinary bequest, and the services as the motive or inducement for making it.

Succession of Fox, 292.

8. One who avers that a remunerative legacy exceeds the disposable portion, must show it. Until this be established, the donee or legatee is not bound to prove the value of his services. *Ib.*
9. The bequest of a sum of money for a specified purpose, is a particular legacy. Such legacies are a charge upon the whole estate, and become the personal debt of the heir, and must be discharged in preference to all others, as if debts of the estate, though they exhaust the whole succession, or all that remains after the payment of the debts and the contribution for the legitimate portions where there are forced heirs. C. C. 1627, 1661.

Succession of Milne, 382.

10. Universal legatees are bound, personally, not only for the debts and charges of the succession, but to discharge all the legacies, unless in case of reduction (C. C. 1603); and where they wish to take the seisin of the succession from the testamentary executor, they must offer him a sum sufficient to pay the moveable legacies. C. C. 1664. *Ib.*
11. Under art. 1682 of the Civil Code, a Court of Probate cannot refuse to order the execution of a foreign will, when shown to have been duly proved before a competent judge of the place where it was received. The object of the law is to give to foreign wills the same effect in the State, which they would have in the country in which they were executed, where they have been duly proved in the latter. But where an olographic will has been received by a foreign tribunal without proof of the writing or signature, such proof not being required by the laws of the country unless the genuineness of the will be attacked, it cannot be executed here, without being first proved according to law before the proper court in this State.

Succession of Robert, 427.

12. Where by the laws of the country in which a foreign will was executed, the original cannot be removed, the will may be ordered to be executed here, when the original has been duly proved before a competent judge of the place where it was received, on the production of a duly certified copy of the record of the proceedings and of the evidence taken before the foreign tribunal, without the production of the original will; and where the testament, being olographic, and its genuineness not having been attacked, the original was received abroad without proof of the writing or signature, it will be

ordered to be executed here on the production of a certified copy thereof, and of testimony taken abroad, under a commission, establishing the genuineness of the original. *Ib.*

13. As to moveables, the capacity or incapacity of a testator must be determined by the law of his domicile. *Ib.*
14. A bequest by a testatrix, a minor natural child, without descendants or ascendants except her mother, domiciled in this State, where all her property, with the exception of her apparel and furniture, was situated, but who had lived for many years in France, where she made her will and died, to one whom she intended to marry, "of all which the law permits her to dispose of," will be construed to have been made with reference to the law of this State, by which the whole of her estate will go to the legatee, and not to that of France, by which she could have disposed of but one half. *Ib.*
15. A bequest of a sum of money "to the orphans of the First Municipality of New Orleans," may be claimed and recovered by the City Council of that Municipality, who are authorized to regulate its distribution among the objects of the testator's bounty. C. C. 1536. *Succession of Mary*, 438.
16. In regard to the creditors of a succession, the administration of the assets and the payment of the debts of the deceased must be governed exclusively by the law of the country where the administrator or executor acts, and from which he derives his authority to collect the assets. No provision of the will can subject them to the necessity of seeking payment elsewhere. Otherwise, as to legatees, who have no claims against the succession but such as the testator pleased to give them, who might make his bounty conditional. They must take their legacies, if at all, *cum onere*. *Ib.*

See SUBSTITUTION.

ERROR.

1. An error into which the jury have fallen in fixing the period from which interest is allowed, which appears from the facts found by them and from the records of the suit, may be corrected by moving for a new trial, or by an application to the judge. Where such error does not exceed the fraction of a dollar, and no attempt has been made to correct it below, the judgment will not be disturbed on appeal. *Mullen v. Miller*, 23.
2. Surveys made by surveyors in the service of the United States, though sanctioned by the Principal Deputy Surveyor of the District, may be corrected when erroneous. *Kittridge v. Landry*, 32.
3. Errors in the return of process should be amended so as to make the return conform to the truth; and the party entitled to demand such amendment, cannot be deprived of the right, by the expiration of the term of service of the sheriff or deputy sheriff who committed the error. Nor is it any objection, that the amendment will affect rights acquired by third persons.
Elmore v. Bell, 484.
4. A sheriff may amend his return, even after a contest in which its validity is attacked. *Ib.*

EVIDENCE.

- I. *When to be Introduced.*
- II. *Competency of Witness.*
- III. *Onus Probandi.*
- IV. *Presumptions.*
- V. *Proof of Contracts, Not in Writing, over five hundred dollars in value.*
- VI. *Records and Judicial Proceedings of other States.*
- VII. *Foreign Laws.*
- VIII. *Matters of Historical Notoriety.*
- IX. *Loss or Destruction of Writings.*
- X. *Secondary Evidence.*
- XI. *Admissibility and Sufficiency of Evidence under the Pleadings.*

I. *When to be Introduced.*

1. On the trial of an exception to the petition, and during the argument of defendants' counsel, plaintiffs offered in evidence letters of tutorship and administration, which were excepted to as too late. The bill of exceptions did not expressly state whether the evidence had been closed. *Held*, that such an objection is a weak one; and that the bill of exceptions should have stated all the circumstances with particularity, to enable the court to determine whether the evidence ought to have been excluded, on a ground purely technical. Objection overruled.

Langfitt v. Clinton and Port Hudson Rail Road Co., 217.

2. An act of sale stipulated that the notes given for the price were to remain with the Notary, until a mortgage existing on the property should be cancelled. Plaintiffs obtained an order of seizure and sale, without having produced any evidence of the cancelling of the mortgage. On an appeal by the defendant, and assignment of the want of evidence of the cancelling as error apparent on the face of the record, plaintiffs offered a certificate of the Recorder of Mortgages to show that the mortgage had been cancelled. *Held*, that the cancelling not having been alleged or proved in the inferior-court, no evidence could be offered to prove it on the appeal.

Petit v. Grandmont, 283.

II. *Competency of Witness.*

3. A witness is incompetent on the score of interest only where he has a direct interest in the event of the suit, and is called to testify in support of that interest; or where the verdict and judgment, to obtain which his testimony is used, would be admissible evidence in his favor, in another suit.

Debays v. Connolly, 338.

4. One who had been offered as security on a twelve months' bond for the price of property sold under execution, and rejected by the sheriff as insuf-

ficient, will be a competent witness to prove his own solvency, on an opposition by the first purchaser, to the homologation under the monition law of 10th March, 1834 of a second sale, made at the risk of the first purchaser, on the ground of the insufficiency of the security. He has no interest either in the event of the suit, or in the question. The bias which may result from being called on to testify to his own solvency, is not enough to exclude him. The interest which renders a witness incompetent, must be a pecuniary one; that which results from his feelings or his wishes, goes to his credibility only. Nor is it sufficient to exclude a witness offered under such circumstances, that he was the endorsee of the note upon which the original suit was instituted; his testimony cannot in any way affect his liability as such. *Ib.*

III. *Onus Probandi.*

5. Persons claiming a part of the estate of an insolvent, as heirs of a deceased wife, on account of the community of gains, must establish their right to recover by adequate evidence. It will not be sufficient to render it probable. *Wilcox v. His Creditors*, 27.
6. A mortgagee who seeks to enforce his mortgage against third persons, must prove that it has been duly recorded. *Cassidy v. His Creditors*, 47.
7. Where a bill of exchange is assignable only by endorsement, one who obtains possession of it by a forged endorsement acquires no interest, though ignorant of the forgery; and the original holder may recover of the acceptor, though the latter have paid the amount of the bill to the person in possession under such endorsement, unless it be shown that such payment was made through the fault of the original holder; but the fault must be shown, and the burden of proof is upon the party who justifies the payment.
Jackson v. Commercial Bank of New Orleans, 128.
8. Where the defendant in a petitory action has established the value of the improvements made by him on the premises, and plaintiff, under art. 500 of the Civil Code, which gives to the owner of the soil on which plantations or constructions have been made by a third person, the election either to reimburse the value of the materials and the price of workmanship, or to pay a sum equal to the enhanced value of the soil, seeks to avail himself of the privilege by paying the enhanced value, he must show the amount of such enhanced value. *Rivas v. Hunstock*, 187.
9. The holder of a negotiable instrument is not required to prove the consideration which he gave for it, unless specially called upon by the answer so to do. *Davidson v. Keyes*, 254.
10. Where a remunerative donation exceeds the disposable portion, the donee or legatee is bound to prove the value of his services. If proved to be equal to or greater than the bequest, no reduction can be made; otherwise, it must be reduced to the estimated value of the services. C. C. 1500, 1512. But where such donation does not exceed the disposable portion, the declaration of the testator as to the services and their value will be conclusive on the heirs, and no proof will be required from the legatee. In the

latter case, the remunerative disposition must be viewed as an ordinary bequest, and the services as the motive or inducement for making it.

Succession of Fox, 292.

11. One who avers that a remunerative legacy exceeds the disposable portion, must show it. Until this be established, the donee or legatee is not bound to prove the value of his services. *Ib.*
12. The demand to be made on a note payable at a particular place, cannot be assimilated to the amicable demand required by the Code of Practice. The want of the latter must be pleaded to put the plaintiff on the proof of it, and a failure to establish it does not prevent his obtaining judgment, but only subjects him to the payment of the costs incurred before the appearance of the defendant. The former must be alleged and proved, or the plaintiff cannot recover. *Stillwell v. Bobb*, 327.

See 13. 17, *infra*.

IV. Presumptions.

13. Fraud will not be presumed. He who alleges it must establish it clearly. *Cassidy v. His Creditors*, 47.
14. Defendant having purchased a lot of negroes, in other respects sound, on placing them in the railway cars to be transported to his plantation, a distance of sixteen miles, discovered in one of them the first symptoms of the measles. The one thus affected was not separated from the rest, either in the cars or on his plantation, and no physician was sent for until four days had elapsed, when another was found ill of the same disease. Both of these, and two others, died of the disease. In an action by the vendor for the price: *Held*, that the measles is not an incurable malady; that defendant, by neglecting to separate the sick girl from the other slaves after notice of the disease, and by omitting to call in medical aid at once, failed to act as a man of ordinary prudence would have done; and that the presumption, created by sect. 3 of the act of 2 January, 1834, as to slaves who have been less than eight months in the State, that any redhibitory malady which displays itself within fifteen days after the sale, existed on the day thereof, does not apply to such a case. *Lyons v. Kenner*, 50.
15. A notarial act will be presumed to be correct, unless the evidence leaves no reasonable doubt of the contrary. *De Blanc v. Martin*, 82.
16. After the lapse of twenty years, the legal presumption is in favor of the acts of sheriffs. *Drouet v. Rice*, 374.
17. Where a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness; and it is incumbent on the underwriters to show that this warranty has not been complied with. But where a loss occurs, which cannot be ascribed to stress of weather or accident, the presumption will be that the vessel was not seaworthy: and the burden of proof must be on the insured. *Dupeyre v. Western Marine and Fire Insurance Co.* 457.
18. In the absence of all evidence, the laws of another State will be presumed to be the same as our own. But where the law is shown to have been the

same, the repeal of the law in this State, will not authorize the assumption that it has also been repealed in the other; such repeal, if it exist, must be proved by the party interested to establish it. *Ex parte Lafonta*, 495.

V. *Proof of Contracts, Not in Writing, over five hundred dollars in value.*

19. A promise to accept a bill, if the amount exceed five hundred dollars, must be proved by at least one witness, and by other corroborating circumstances. These circumstances must be established *aliunde*, and not by the witness himself. *Robbins v. Lambeth*, 304.

VI. *Records and Judicial Proceedings of other States.*

20. Where a party wishes to obtain an execution on a judgment rendered in another State, he must produce a record attested in the mode pointed out in that part of the Code of Practice regulating executory process. A transcript certified by the clerk of the court, sealed with the seal of the court, and authenticated by the signature of the Governor and the great seal of the State, is insufficient. It should have been accompanied by a certificate from the judge, chief justice, or presiding magistrate, declaring that the attestation of the clerk was in due form. *Goodman v. James*, 297.

VII. *Foreign Laws.*

21. Foreign laws must be proved as facts. In the absence of proof of what they are, our own laws must govern. *Bonneau v. Poydras*, 1.

VIII. *Matters of Historical Notoriety.*

22. The date of the election or resignation of a Senator of the United States, of the appointment of a member of the President's Cabinet, or of a Foreign Minister, are matters of historical notoriety, which the court will notice though not proved in the record. *Walden v. Canfield*, 466.

IX. *Loss or Destruction of Writings.*

23. A Bank will be responsible for the amount of a note issued by it, on proof of its loss and of the contents of the note. So, on the production of the half of a note, where the absence of the other half is fairly accounted for, the Bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half.

Murdock v. Union Bank of Louisiana, 112.

24. In an action by the holder of the half of a bank note, where the half on which the president's signature is usually affixed has been lost, the signature of the president need not be proved. It will not be presumed that notes were ever issued without the signature of that officer. *Ib.*

X. *Secondary Evidence.*

25. The subpoena for a witness having been returned not executed, plaintiff's attorney made oath that, as soon as he learned that it had not been served,

he applied to the landlady in whose house the witness had resided, and was informed that he had left without paying the rent, and that she could not tell where he had gone. *Held*, that the absence of the witness was sufficiently accounted for, and that his testimony taken in another suit might be read on the trial. *Pilié v. Kenner*, 95.

26. In an action against a Company, plaintiffs introduced witnesses who proved, without objection, that they had been appointed engineers of the Company, by a written resolution of the Board of Directors. On a motion to strike out the evidence, on the ground that parol evidence of the appointment was inadmissible: *Held*, that, the testimony having been received without objection, and defendants having it in their power to offer in evidence the resolutions and contract with the witnesses, if material to their defence, the motion was correctly overruled.

Langfitt v. Clinton and Port Hudson Rail Road Co., 217.

XI. Admissibility and Sufficiency of Evidence under the Pleadings.

27. To recover in a redhibitory action, a purchaser must show that he acted with, at least, ordinary care and attention, and that no act or omission of his can have occasioned the loss he attempts to throw upon his vendor.

Lyons v. Kenner, 50.

28. A return of no property found after demand of the parties, made by the sheriff on a *feri facias* against the defendant, in an action in which sequestered property had been released on a bond, is sufficient evidence of a breach of the condition of the bond given for the release of the property sequestered, in an action against the surety. *Massé v. Barthet*, 69.

29. It will be no objection to the admissibility in evidence of an act, executed by plaintiff's vendor, in relation to the land in dispute, that no evidence was adduced of its having been recorded in the office of the parish judge, without which it could have no effect against third persons. Whether the act is binding on the plaintiff, is a question going to the effect, and not to the admissibility of the instrument. *Kittridge v. Landry*, 72. *Kittridge v. Dugas*, 85.

30. An instrument offered in evidence will not be rejected on the ground that it appears to have been wrongfully obtained. It will be received, and its effect tested afterwards. *Ib.*

31. Parol evidence is admissible to sustain a plea of prescription, by establishing possession, its character, and other requisites to sustain the plea; or to disprove it, by showing that the party did not possess as owner, or had renounced the benefit of prescription. *Ib.*

32. A direct action is not necessary to establish the falsehood of a notarial act; it may be shown collaterally. *De Blanc v. Martin*, 82.

33. Where a witness is illiterate, or his statements appear extraordinary, evidence may be introduced to sustain his testimony, by showing that he made the same statements at the time of the transaction, though no attempt had been made to impeach his evidence or character. *Pilié v. Kenner*, 95.

34. The decision of the lower court, as to the admission or rejection of a witness not introduced at the regular time, will be affirmed, unless the discretion allowed in such cases appears clearly to have been incorrectly exercised. *Ib.*
35. On a motion to dissolve an injunction, on the ground of illegality apparent on the face of the petition, no evidence can be introduced, except as to the question of damages. *Hobson v. Bein*, 109.
36. The evidence necessary to support an action on a bill as an accepted bill, and on a breach of promise to accept, is materially different. To maintain the former, the promise must be applied to the particular bill alleged to have been accepted; in the latter case, the evidence may be of a more general character, and the authority to draw be collected from circumstances, and extended to all bills coming within the scope of the promise.
Von Phul v. Sloan, 148.
37. An offer of restitution must be proved, to maintain an action of rescission.
Walden v. City Bank of New Orleans, 165.
38. The omission by a purchaser to notify his vendor, or those who are responsible to him in case of eviction, of the action instituted against him, will not, under arts. 2494 of the Civil Code, and 388 of the Code of Practice, release the latter, unless they can show that they had means to defeat the action, which were not used owing to their not having been cited in warranty, or apprized of the institution of the suit. By the word *means*, in art. 2494 of the Civil Code, must be understood new facts, or peremptory exceptions, which, if presented to the court, would have produced a different result. It will not be sufficient to show that there was error in the judgment, for the same judgment would have been pronounced against them, had they been cited. *Rivas v. Hunstock*, 187.
39. It is no objection to a witness, offered to prove the defective construction of a railway, that he is not a professional engineer. His testimony is admissible, and should be left to the jury for what it is worth.
Langfitt v. Clinton and Port Hudson Rail Road Co. 217.
40. To obtain a judgment against a sheriff, with damages, for his failure to return an order of seizure and sale on or before the return day, as required by the act of 7th April, 1826, sect. 17, it must be shown that a writ of seizure and sale was actually placed in his hands, and that he failed to return it on the return day mentioned therein. A statement in the judgment appealed from, that a writ was issued, is not sufficient. Such statements are not evidence. *Destréhan v. Garcia*, 291.
41. Acknowledgments by one since deceased, proved by a witness who could not be contradicted, much less convicted of perjury, though he had sworn falsely, are the weakest kind of evidence, and scarcely worthy of any belief. But where, in an action for the value of work done for the deceased, it was proved to have been performed; and two witnesses testified to the acknowledgment of the debt by the deceased, *in extremis*, in the presence of his wife and of the magistrate who was receiving his will, either of whom might have been produced to contradict the statement if false, and no other attempt

- was made to rebut or discredit the testimony, the claim will be considered sufficiently proved. *Succession of Fox*, 299.
42. Where an attachment has been set aside by order of court, it is *prima facie* evidence that it was illegally issued, and that damages to some extent have been sustained. *Cox v. Robinson*, 313.
43. Evidence presented by one of the parties, but not contained in the record, will not be permitted, under any circumstances, to influence the decision of the court. *Stillwell v. Bobb*, 327.
44. Cases of *Wetmore & Co. v. Merrifield*, 17 La. 513, and *Booraem v. Merrifield*, *Ib.* 594, overruled, so far as they go to establish that, in an action against the drawer of a bill or maker of a note payable at a particular place, proof of a demand at such place is not necessary, where want of amicable demand has not been pleaded. *Ib.*
45. The possession of a bill of lading, like that of a bill of exchange, is *prima facie* evidence of title; and, in the absence of contradictory evidence, will entitle an intervening claimant to bond the property seized by attachment. *Park v. Porter*, 342.
46. A marriage contract, executed before a notary, which attests that a sum was received by the husband from the wife, as a part of her dowry, in the presence of the notary and subscribing witnesses, is the best evidence of which the payment is susceptible. But it may be rebutted by evidence establishing collusion, as that the money had been obtained only for the moment, and had been repaid. *Lambert v. His Creditors*, 474.
47. The vendee may, generally, establish the sale, by proof of the acts and admissions of his vendor. Where fraud is suspected, the admissions of the alleged vendor, must be received with caution, but cannot be absolutely rejected. *Planters Bank of Mississippi v. Crane*, 489.
48. Putting the defendant *in mora*, is a condition precedent to the recovery of damages for a passive violation of a contract. Such damages are only due after the debtor has been put in default, and the default must be alleged and proved; nor can evidence be received to prove a demand, where it has not been alleged in the petition. *McMaster v. Brander*, 498.

EXCEPTIONS.

See PLEADING, IV.

EXCEPTIONS, BILL OF.

1. Any attempt to amend a bill of exceptions, after judgment signed, is wholly irregular. *Police Jury of Pointe Coupée v. Gardiner*, 133.
2. On the trial of an exception to the petition, and during the argument of defendants' counsel, plaintiffs offered in evidence letters of tutorship and administration, which were excepted to as too late. The bill of exceptions did not expressly state whether the evidence had been closed. *Held*, that such an objection is a weak one; and that the bill of exceptions should have stated all the circumstances with particularity, to enable the court to deter-

mine whether the evidence ought to have been excluded, on a ground purely technical. Objection overruled.

Langfitt v. Clinton and Port Hudson Rail Road Co., 217.

EXECUTOR.

See SUCCESSIONS I.

EXECUTORY PROCESS.

1. An order of seizure and sale obtained against a third person, will be set aside, where the mortgage was not proved to have been recorded.

Cassidy v. His Creditors, 47.

2. An injunction, and not a rule to show cause, is the proper proceeding to arrest an order of seizure and sale. C. P. 738. *Clement v. Oakley*, 90.
3. Ground, comprising several squares in the city of New Orleans, was mortgaged to plaintiff, and described in the act according to the plan of the city as it existed at the time. By subsequent proceedings of the municipal authorities, the names of the streets, and numbers and boundaries of the squares were changed: *Held*, that the advertisement of the property to be sold according to the old plan, was no cause to rescind the order of seizure and sale; and that the alterations made by the municipal authorities were matters of public notoriety. *Ib.*
4. Where a party wishes to obtain an execution on a judgment rendered in another State, he must produce a record attested in the mode pointed out in that part of the Code of Practice regulating executory process. A transcript certified by the clerk of the court, sealed with the seal of the court, and authenticated by the signature of the Governor and the great seal of the State, is insufficient. It should have been accompanied by a certificate from the judge, chief justice, or presiding magistrate, declaring that the attestation of the clerk was in due form. *Goodman v. James*, 297.
5. The possession of a promissory note, payable to order, and endorsed in blank, is *prima facie* evidence of title, the property passing by delivery. No other transfer is necessary to entitle a party to avail himself, *via ordinaria*, of a mortgage given to secure its payment; but to proceed, *via executiva*, the mortgage must be transferred by an authentic act.
Fitzwilliams v. Wilcox, 303.
6. Where a mortgage contains the clause *de non alienando*, no transfer of the property can affect the mortgagee's right to proceed against it, summarily, as if still belonging to the mortgagor. *Murphy v. Jandot*, 378.

FIERI FACIAS.

1. Art. 641 of the Code of Practice, exempting the tools and instruments necessary for the exercise of the trade or profession of the debtor from seizure, was intended to encourage such useful trades and professions, by enabling the debtor to sustain himself and family by his own industry, and to hold out to the creditor the prospect of satisfaction from the future labor of his debtor;

- and in the cases to which it applies, will exempt the books of professional men from seizure. But where the debtor resides abroad, or has absconded, or permanently left the State, his linen, clothes, bed, arms, and the tools and instruments of his trade or profession, may be seized and sold for the payment of his debts. *Lambeth v. Milton*, 81.
2. Ground, comprising several squares in the city of New Orleans, was mortgaged to plaintiff, and described in the act according to the plan of the city as it existed at the time. By subsequent proceedings of the municipal authorities, the names of the streets, and numbers and boundaries of the squares were changed: *Held*, that the advertisement of the property to be sold according to the old plan, was no cause to rescind the order of seizure and sale; and that the alterations made by the municipal authorities were matters of public notoriety. *Clement v. Oakey*, 90.
 3. The provision requiring that, in forced sales for cash, the property shall bring two-thirds of its appraised value, was intended for the protection of the debtor, whose property might otherwise be sacrificed.
Egerton &c. v. Their Creditors, 201.
 4. The members of a commercial partnership have each the right to represent the firm. But where it is attempted to satisfy a judgment against the partnership out of the individual property of a member, he alone can waive the formalities required by law for its alienation. In such a case, a partner has no more authority than a stranger. *Byrne v. Hooper*, 229.
 5. Where property is ordered to be sold for cash to satisfy the claim of a plaintiff, who, after the adjudication, agrees to allow the debtor time for the payment of the amount of his bid, and informs the sheriff that the arrangement is satisfactory to him, the officer is bound to convey the property to the purchaser, as if the amount had been paid in conformity to the terms of the adjudication. *Gallier v. Garcia*, 319.
 6. Article 2589 of the Civil Code, relative to sales *à la folle enchère*, does not apply to those made by a sheriff under writs issuing on final judgments. In the latter, if the price be not immediately paid, where the sale is for cash, or if the proper surety be not given at once, when on credit, the sheriff must proceed forthwith, under article 689 of the Code of Practice, to sell the property anew. If he give any delay, it is at his own risk, and he will be responsible in damages to the plaintiff.
 7. Where property has been seized under a *fi. fa.*, the sheriff may proceed to sell, though the return day has passed, or the writ itself has been returned into court; and payment to the sheriff, under such circumstances, for the purpose of liberating the property seized, will discharge the debt.
Byrne v. Taylor, 341.
 8. Judgment against an Insurance Company, and execution returned unsatisfied. Under the 13th sect. of the act of 20 March, 1839, plaintiffs interrogated the appellants, who admitted that they were stockholders in the Company. It was proved that the latter were responsible for a balance due on their shares of stock, which was liable to be called in by the Directors. *Held*, that plaintiffs might exercise against the appellants, all the rights

which the defendants could have exercised against them ; and that, the amount of plaintiffs' claim being less than that which appellants were liable to be called on to pay on their stock, the former were entitled to an execution against them. *Cucullu v. Union Insurance Co.*, 571.

FOREIGN LAWS.

1. In the absence of all evidence, the laws of another State will be presumed to be the same as our own. But where the law is shown to have been the same, the repeal of the law in this State, will not authorize the assumption that it has also been repealed in the other ; such repeal, if it exist, must be proved by the party interested to establish it. *Ex parte Lafonta*, 494.
2. Foreign laws must be proved as facts. In the absence of proof of what they are, our own laws must govern. *Bonneau v. Poydras*, 1.

See CONFLICT OF LAWS.

FORGERY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 8.

FORTUITOUS EVENT.

See QUASI OFFENCES, 1.

FRAUD.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 9. CONTRACTS, 7. 8. EVIDENCE, 13. INSOLVENCY, 10.

HOUSE-KEEPER.

See JURY, 6. 7.

HUSBAND AND WIFE.

1. Where in an action by a married woman, defendant excepts on the ground that plaintiff was not authorized by her husband or by a court, the only effect of the exception, if sustained, is, to require the plaintiff to exhibit her authorization before proceeding farther with the case. It is immaterial at what time such authority may be obtained and produced, provided it be before the trial of the case on its merits. C. P. 320, 321.
Bonneau v. Poydras, 1.
2. A married woman, separated in bed and board, may, under the laws of this State, sue without the authorization of her husband or a court. Proof of the existence of the judgment of separation, is all that is requisite to establish her authority. C. C. 125, 2410. Act of 1 April, 1826, § 2. *Ib.*

3. Under art. 2410 of the Civil Code, a wife, separated in property, may dispose of her claim to a portion of the proceeds of the sale of the property of a succession, without the consent of her husband. *Ib.*
4. Persons claiming a part of the estate of an insolvent, as heirs of a deceased wife, on account of the community of gains, must establish their right to recover by adequate evidence. It will not be sufficient to render it probable.
Wilcox v. His Creditors, 27.
5. Where an action had been commenced by a married woman, without the authority of her husband or of the court, who, two days after, obtained a judgment of separation from bed and board, on an exception to her right to sue : *Held*, that the exception should be overruled, as it would have been useless to dismiss a suit which might be commenced immediately afterwards, her disability having been removed. *Baldwin v. Union Insurance Co.*, 133.
6. A wife can in no case sell to her husband, or contract towards him the obligations of a vendor, though the husband may, in some cases, sell to her. She cannot, consequently, be cited in warranty by the representative of her deceased husband. *Wherry v. Bell*, 225.
7. The authorization required to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than her own allegations, or those of her counsel. *Gorman v. Berghans*, 282.
8. Unless specially empowered by the husband, an attorney at law cannot authorize the wife of his client to do any act for which the authorization of the husband is required. *Ib.*
9. A married woman, not separated in property, cannot accept the offer of testamentary executrix, without the consent of her husband (C. C. 1657) ; nor can she, after acceptance, appear in court in the execution of the trust, without the authority and assistance of the latter. The cases provided for by arts. 125 of the Civil Code, and 106 of the Code of Practice, are the only exceptions to the general rule prescribed by art. 123 of the Civil Code, that a wife cannot appear in court without the authorization of her husband.
Dussumier v. Coiron, 368.
10. A marriage contract, executed before a notary, which attests that a sum was received by the husband from the wife, as a part of her dowry, in the presence of the notary and subscribing witnesses, is the best evidence of which the payment is susceptible. But it may be rebutted by evidence establishing collusion, as that the money had been obtained only for the moment and had been repaid. *Lambert v. His Creditors*, 474.
11. The provisions of the Civil Code which establish mortgages in favor of married women, at least so far as they are tacit and exist without being recorded, are confined to persons who marry in this State, or who, after marrying abroad, come to reside here ; and, in the latter case, such tacit mortgages exist only for sums received since their removal to this State.
Prats v. His Creditors, 501.
12. The ratification by a husband of a contract of partnership entered into by his wife, an unemancipated minor, before marriage, will be binding on the

latter, he being by law the administrator of her dower. C. C. 2327, 2329, 2330, 2334. *Jonau v. Blanchard*, 513.

HYPOTHECARY ACTION.

See EXECUTORY PROCESS.

HYPOTHECATION.

See SHIPPING, 1, 3.

IMMOVEABLES.

The provision of art. 463, of the Civil Code, making an action for the recovery of an entire succession, an immoveable, relates only to the action given to the heir to recover an entire succession in kind, such as it existed at the time it was opened. It does not apply to an universal legatee, or legatee under an universal title, limited to claiming the moveable part of a succession, or a portion of the residue thereof, and not entitled to take possession of the estate in kind, in the condition in which it was at the opening of the succession. *Bonneau v. Poydras*, 1.

IMPRISONMENT FOR DEBT.

See ARREST.

IMPROVEMENTS.

See ACCESSION.

INJUNCTION.

1. An injunction, and not a rule to show cause, is the proper proceeding to arrest an order of seizure and sale. C. P. 738. *Clement v. Oakey*, 90.
2. On a motion to dissolve an injunction, on the ground of illegality apparent on the face of the petition, no evidence can be introduced, except as to the question of damages. *Hobson v. Bein*, 109.
3. Sect. 3 of the act of 25th March, 1831, authorizing the court, in case of the dissolution of an injunction, to condemn, in the same judgment, the plaintiff and his surety, jointly and severally, to pay to the defendant interest on the amount of the judgment and damages, applies only where judgments have been enjoined. In other cases, the defendant must be left to his remedy on the bond. *Walden v. City Bank of New Orleans*, 165. *First Municipality of New Orleans v. Orleans Theatre Co.*, 209.
4. Defendant commenced an action to rescind a contract of loan for \$200,000, the amount of which was secured by mortgage, and obtained an injunction

to restrain the plaintiffs from summary proceedings under the mortgage until the further order of court. The injunction having been dissolved, he and his sureties in the injunction bond took a suspensive appeal, giving security in the sum of \$6000. Plaintiffs thereupon applied for an order of seizure and sale, which was refused, on the ground of the pendency of the appeal from the order dissolving the injunction. On appeal by the plaintiffs from this judgment: *Held*, that a suspensive appeal having been taken from the judgment of dissolution, the injunction was thereby maintained until the final decision of the appellate court.

City Bank of New Orleans v. Walden, 181.

5. The surety in an injunction bond may be surety for his principal, on an appeal by the latter from a judgment dissolving the injunction, and condemning principal and surety, *in solido*, to the payment of damages and costs.

Greiner v. Prendergast, 235.

INSOLVENCY.

I. *Of the Stay of Proceedings.*

II. *Effects of Surrender.*

III. *Contracts of Insolvent Fraudulent or Void as to Creditors.*

IV. *Sale of Property Surrendered.*

V. *Responsibility and Compensation of Syndic.*

VI. *Tableau of Distribution.*

I. *Of the Stay of Proceedings.*

1. An action for the recovery of goods claimed by plaintiff as his property, which had been surrendered by an insolvent, against one who holds them as the syndic of the creditors of the insolvent, must be brought before the court in which the proceedings in insolvency are pending, and must be tried contradictorily with the creditors. Otherwise, were defendant sued in his private capacity, for damages for unlawfully taken possession of the property of the plaintiff; such an action may be brought before any court of competent jurisdiction. *Clossman v. Barbancey*, 346.
2. Bail may arrest the principal out of the State in which the bail bond was given, and even after the latter has obtained a stay of proceedings.

Ex parte Lafonta, 495.

II. *Effects of Surrender.*

3. All the rights and property of the insolvent pass to his creditors by the surrender, whether included in his schedule or not.

Baldwin v. Union Insurance Co., 133.

4. The creditors of an insolvent who has made a surrender, are not the owners of the property surrendered for their benefit. Their interest is the same as that of a plaintiff in property seized under a *fi. fa.* They cannot sell it

without an order of the court before which the proceedings are pending ; and the sale must be made like that of property seized under execution.

Rivas v. Hunstock, 187.

5. By the acceptance of the *cessio bonorum* by the judge for the benefit of the creditors, the property surrendered is vested in the latter so as to be no longer liable to seizure, attachment, or execution ; but they acquire no real ownership in it. It is vested in them only to a certain extent, and for certain purposes. They cannot hold it in common, nor partition it in kind. It is in their hands only as a pledge, which they are bound to have sold in the manner pointed out by law, in order to divide the proceeds among themselves. The real ownership remains in the debtor, who may take it back on depositing in court a sum sufficient to pay his debts ; and who, in case of sale, is entitled to any balance in the hands of the syndic after the payment of his debts, as an ordinary debtor to any surplus in the hands of the sheriff after the satisfaction of the judgment under which his property has been sold.

Ib.

III. *Contracts of Insolvent Fraudulent or Void as to Creditors.*

6. A contract will be deemed to have been made in fraud of creditors, where the obligee knew that the obligor was in insolvent circumstances, and the contract gives to the obligee, if a creditor, any advantage over the other creditors of the obligor. It will not be necessary to establish positive knowledge in the obligee of such insolvency ; proof of circumstances tending to produce a strong impression that he was aware of it, will suffice.

DeBlanc v. Martin, 38.

7. A contract made in good faith cannot be annulled, though it prove injurious to creditors ; nor can a contract, though made in bad faith, be rescinded, unless it operate to their injury. C. C. 1973. *Taylor v. Whittemore*, 99.
8. A third person, not a creditor, having advanced money to defendants, at an usurious interest, on certain articles held as security for its re-payment, which advances were applied to the benefit of the creditors of the latter, on a seizure by plaintiffs under an execution against defendants. *Held*, that such third person ought to lose the usurious interest exacted by him ; and that the difference between the sum advanced and the real value of the articles, is all that was liable to seizure. *Ib.*
9. Where notes given for the price of property, sold by one in insolvent circumstances for the purpose of giving an undue preference to certain creditors, have, in the ordinary course of trade, come into the possession of third parties, without notice of the nullity of the sale, the latter will be protected.

Robinson v. Shelton, 277.

10. An action to rescind a contract of sale or pledge made by an insolvent, on the ground of its having been executed with intent to give a preference to certain creditors, is prescribed by one year. C. C. 1982. *Ib.*

IV. *Sale of Property Surrendered.*

11. By art. 2602 of the Civil Code, all the warranties to which private sales are subject, exist against the heirs in judicial sales of the property of successions. *Aliter*, as to the creditors, on the sale of the property surrendered by an insolvent. The heirs are warrantors to the fullest extent, being owners and vendors, while the creditors are neither. The latter are only responsible, severally, for the restitution of the proceeds of the sale of the property received by them. *Rivas v. Hunstock*, 187.
12. Where the creditors of an insolvent do not avail themselves of the privilege allowed them by the act of 29th March, 1826, to fix the terms on which the property surrendered shall be sold, the sale must be made on the terms and with the formalities prescribed for the sale of property seized in execution. Civ. Code, art. 2180. It must be appraised, and first offered for sale for cash, when, if it cannot be sold for two-thirds of its appraised value, it must be offered, fifteen days after, if immoveable property, on a credit of twelve months. Code Pract., arts. 675, 680, 681. *Aliter*, where the creditors have, under the act of 1826, fixed the terms of sale.
Egerton, &c. v. Their Creditors, 201.
13. The provision requiring that, in forced sales for cash, the property shall bring two-thirds of its appraised value, was intended for the protection of the debtor, whose property might otherwise be sacrificed. But this danger does not exist, where the creditors of an insolvent, who are interested that the property shall sell for as much as possible, have themselves fixed the terms which they consider the most favorable. In such a case, the syndic is not bound to act with the same strictness as a sheriff acting under a *fi. fa.* He may, like other agents, exercise his discretion, and, under proper circumstances, may suspend the sale, if the property is likely to be sacrificed. Act 20th Feb. 1817. *Ib.*
14. The sale of an immoveable by the syndic of the creditors of an insolvent, cannot affect the rights of a creditor who never made himself a party to the insolvent proceedings, having a mortgage with a pact *de non alienando*. He may seize and sell the property into whosoever hands it may have passed. But where, by appearing at the meeting of creditors, and fixing the terms of sale of the mortgaged property, he has made himself a party to the *concurso*, he will be considered as having waived this right, and must look to the proceeds in the hands of the syndic, whom he has made his agent.
Ib.
15. The application, required by sect. 30 of the act of 20th February, 1817, to be made to the court by the syndic. for authority to sell the property of an insolvent, may be by motion, which is but an oral petition. The object of the law is answered, when the syndic is authorized by the court.
Lange v. His Creditors, 539.
16. The appraisers of property surrendered by an insolvent, and ordered to be sold, are not required to be appointed by the insolvent and the syndic. They may be appointed and sworn by the court, before which the *concurso* is

pending. It will be a sufficient compliance with art. 2180 of the Civil Code, which requires the sales of property ceded to creditors to be made on the same terms and under the same formalities as property seized on execution, if the formalities be substantially fulfilled. *Ib.*

V. Responsibility and Compensation of Syndic.

17. Where money belonging to the estate of an insolvent, has been withdrawn from bank on the joint checks of the two syndics, and there is no proof of the amounts which they respectively received or retained, each will be presumed to have received one-half. *Yard, &c. v. Their Creditors*, 400.
18. The responsibility of the syndics of the creditors of an insolvent is joint, not joint and several. *C. C. 2983. Ib.*
19. The penalty imposed by the act of 13th March, 1837, section 3, on syndics, for failing to comply with its provisions in regard to the depositing in bank of money belonging to the estates administered, is for the benefit of the estates, and not of any individual creditor. *Ib.*
20. The syndic of the creditors of an insolvent is their agent, and, like other agents, is bound to show due diligence in the discharge of his mandate, and to render a full and complete account of every item of property coming into his possession, supported by the necessary vouchers, showing how such property has been disposed of. With regard to the debts due to the estate, he is bound to show what portion has been paid, what proceedings have been had to enforce payment, or what reasons existed for not enforcing it. Any creditor has a right to call for such an account, and the burden of proving its correctness will be on the syndic. *Prieur, &c. v. Their Creditors*, 541.
21. The syndic of the creditors of an insolvent will not be entitled to his commissions, until it is fully proved that he has faithfully and diligently administered the estate. *Ib.*

VI. Tableau of Distribution.

22. A tableau of distribution filed by the syndic of the creditors of an insolvent as a final one, having been opposed by a creditor who had been put on it as entitled to a certain sum, was homologated so far as not opposed. Afterwards, on the trial of the opposition, there was a judgment declaring the tableau a provisional one, ordering the funds to be distributed in conformity thereto, and refusing to discharge the syndic, or to allow his commission; from which judgment both the opponent and the syndic appealed, the appeal taken by the latter being only devolutive. On a rule by the opponent on the syndic, to show cause why the amount for which he had been placed on the tableau, should not be paid to him: *Held*, that the appeal of the syndic being devolutive only, and the object of the rule being merely to enforce the judgment, the rule should have been made absolute.

INSURANCE.

1. Where an agent, whose duty it was to procure insurance for his principal, neglects to do so, he will be responsible for any loss which may result from his neglect. *Strong v. High*, 103.
2. Under a policy of insurance on a house, with the condition that, in case of loss, the assurers may either rebuild, or pay the amount of the loss as soon as proved, rent for the period occupied in rebuilding or repairing, cannot be recovered as part of the indemnity due to the assured. Such rent formed a distinct insurable interest.

Pontalba v. Phoenix Assurance Company of London, 131.

3. The general principle, that the assurers are bound to adjust a loss upon the principle of replacing the assured, as near as may be, in the situation they were in before the fire, has never been understood to extend to the profits or fruits which the latter was drawing, or might have drawn from the thing insured. *Ib.*
4. The owner, or tenant of a house, insuring against fire, is not bound to disclose or communicate to the insurers the names or pursuits of sub-tenants living on the premises. If the insurers wish to guard against the risk from certain pursuits or occupations of tenants or sub-tenants, they have it in their power to insert in the policy a warranty to that effect, which being a condition precedent, whether material or immaterial to the risk, must be complied with, before any action can be maintained on the policy.

Lyon v. Commercial Insurance Co., 266.

5. The owner of a house which has been insured, has a right to have it occupied by any one he pleases, provided the occupations of such persons, or the property placed in the house, is not of a nature to vitiate the policy under the conditions relative to hazardous or extra-hazardous risks. *Ib.*
6. Where a stock of goods in a house are insured, the manner in which the rest of the building is occupied, cannot affect the policy, unless some warranty has been made in relation thereto, or there has been a concealment or misrepresentation of facts deemed by the jury material to the risk. *Ib.*
7. Where, pending the negotiations for a policy, the insurers expressed an objection to insuring property in the neighborhood of gambling establishments, and the applicant knew at the time that there was such an establishment within the premises in which the property was insured, it will be left to the jury to say whether this was a fact, the concealment or misrepresentation of which was so material to the risk as to vitiate the policy. It is of no consequence whether it was considered material to the risk by the insurers; it must be considered so by the jury. Where a fact, not provided for by a warranty on the face of the policy, is concealed, it cannot affect the right to recover, unless material to the risk, when it avoids the policy on the ground of fraud or of its having misled the insurers; and, in all such cases, the materiality of the facts concealed or misrepresented must be left to the jury, who are the proper judges whether the risk has been thereby increased. *Ib.*

8. Seaworthiness is an implied warranty in every contract of insurance. It is a condition precedent, without which the liability of the insurers cannot exist, although the unseaworthiness may result from some vice or defect unknown to the insured.

Dupeyre v. Western Marine and Fire Insurance Co., 457.

9. Where a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness; and it is incumbent on the underwriters to show that this warranty has not been complied with. But where a loss occurs which cannot be ascribed to stress of weather or accident, the presumption will be that the vessel was not seaworthy; and the burden of proof must be on the insured. *Ib.*
10. A policy of insurance protects against extraordinary accidents and perils; but cannot be considered as securing indemnity for natural decay and ordinary wear and tear. *Ib.*
11. The party insured will be responsible for any loss, occasioned by want of proper care on the part of his agents. *Ib.*
12. Although, generally, the warranty of seaworthiness refers to the commencement of the risk, the fact of being seaworthy then does not satisfy the warranty. The vessel must be kept in a seaworthy condition, or restored to it in the successive stages of the voyage, so far as it depends on the insured or his agents. *Ib.*
13. Plaintiffs, who were grocers, had two policies of insurance on their stock in trade. Having subsequently purchased the stock of another grocer, which had been insured by the defendants, they removed their own stock to the establishment of their vendor, whose policy had been transferred to them with the consent of defendants. Plaintiffs also obtained from their own insurers transfers of the policies on the stock in their former establishment, to the same stock in the store to which they removed. The policies contained the usual clause requiring notice to the insurers, and an endorsement on the policy, of any other insurance elsewhere on the same stock, on pain of forfeiture. Plaintiffs omitted to notify defendants of the two insurances, previously existing on their stock. The stock being injured by fire, in an action against defendants: *Held*, that, by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock in trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock; and that, having failed to do so, they cannot recover.

Walton v. Louisiana State Marine and Fire Insurance Co., 563.

INTEREST.

1. Interest will be allowed on the amount of the damages on protested bills or notes. *Bank of the United States v. Merle*, 117.

2. Conventional interest can be recovered only where there has been an agreement, in writing, to pay it. *Buckner v. Chapman*, 360.
3. Interest cannot be allowed on the items of an open account, unless a balance has been struck. *Ib.*
4. The holder of a note given for the price of a slave, will be entitled to interest from maturity, though the note contained no stipulation to that effect, and was not protested. C. C. 2531, 2532. *Gay v. Kendig*, 472.

INTERROGATORIES TO THIRD PERSONS UNDER A FIERI FACIAS.

The proceeding under sect. 13, of the act of 20 March, 1839, authorizing a plaintiff to propound interrogatories to third persons, touching any property in their possession belonging to the defendant, or any debt which they may owe to the latter, cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived, by such a proceeding, of any advantage or means of defence they would have in a direct action against them. *Taylor v. Whittemore*, 99.

JUDGMENT

1. A judgment ordering a certain sum belonging to a succession, in the hands of the executors, to be appropriated in a particular way, is not binding on a legatee not a party to the proceeding. *Succession of Milne*, 382.
2. The sureties on a bond given for the release of property attached, the condition of which is that they shall satisfy whatever judgment may be rendered in the suit, though not parties to the action, may plead the nullity of the judgment, when called upon to satisfy it. Their undertaking was, to satisfy any judgment legally obtained. When a judgment is absolutely null, any one having the least interest in opposing its effect, may have such nullity pronounced. *Quine v. Mayes*, 510.
3. In an action against the sureties of a public officer, to recover an amount due to the plaintiffs from the latter, judgment should be rendered for the sum actually due, and not for the whole penalty of the bond to be satisfied by the payment of the amount so due. *Dougherty v. Peters*, 534.
4. Where several courts have concurrent jurisdiction of actions against the sureties of a public officer, no one of them can condemn the sureties to bring into court the amount for which they may be ultimately responsible, and discharge them from further liability. The creditors cannot be compelled to come into that tribunal for redress. The judgment should be only for the amount due to the plaintiff. *Ib.*

JUDGMENT, INTERLOCUTORY.

See APPEAL, I.

JURY.

1. The verdict of a jury will not be disturbed, unless manifestly erroneous.
De Blanc v. Martin, 82.
2. Motion for a new trial by plaintiff, in an action to annul a mortgage, on the ground that the clerk of the parish judge before whom the mortgage was executed, had entered into a conversation with five of the jurors, while they were at dinner, during a recess of the court and before the argument had ended, and told them that if they annulled the mortgage their own mortgages, if they had any, would also be annulled. *Held*, that the motion was correctly overruled, there being no evidence that any fact was communicated which had not been sworn to on the trial, nor that any of the jury were interested in the question. *Ib*.
3. Execution having been issued against defendant in an action on a note secured by mortgage, the proceedings were enjoined by a third person, the real owner of the mortgaged property, and the real debtor of the amount of the note; and a judgment was entered by consent, recognizing the property as belonging to the intervenor, and ordering its sale. The sale made in pursuance of this judgment having been set aside for irregularity, plaintiffs took a rule on intervenor to show cause why a *pluries fi. fa.* should not be issued. On an answer by the latter alleging the illegality of the judgment, and denying plaintiffs' right to proceed in the manner adopted by them, and praying for a trial by jury: *Held*, that the rule presented no issue or question of fact for a trial by jury, and that such trial was correctly refused.
Hobson v. Bein, 109.
4. The act of 6th March, 1840, directing the mode of composing and drawing juries for District Courts, does not apply to the First Judicial District, in which juries are not required to be drawn twenty days before each term of the court. *Lyon v. Commercial Insurance Co.*, 266.
5. A formal writ of *venire facias* is not required by the laws of this State in any case. An order of court for drawing and summoning jurors is sufficient. *Ib*.
6. Since the act of 25th March, 1831, prescribing the qualifications of jurors, does not require that they should be housekeepers, it may well be doubted whether that qualification, prescribed by art. 506 of the Code of Practice, is now necessary. *Ib*.
7. One who resides in the parish, and pays a tax and house rent, is a *house-keeper* in the meaning of art. 506 of the Code of Practice. *Ib*.
8. A prayer for a jury is too late after the case has been set for trial. C. P. 494, 495. *Menefee v. Johnson*, 274.
9. The verdict of a jury will be set aside when contrary to the evidence.
Boullemet v. Philips, 365.

See ERROR, 1.

JUSTICE OF THE PEACE.

See LEASE, 4, 5.

LEASE.

1. Builders who contract with tenants for alterations or repairs of the premises leased, have no lien or privilege on the premises. There is no privity between the builder and the owner. *Sewall v. Duplessis*, 66.
2. Art. 2697 of the Civ. Code, which provides that a lessee may remove the improvements and additions he has made to the thing let, provided he leave it in the state in which he received it, cannot be extended by implication to builders who contract with such lessees. Such contractors must be considered as having done the work on the personal credit of the lessee; and they have no right to remove the materials used in such repairs and improvements, on the ground that they have not been paid for. *Ib.*
3. Arts. 91 and 156 of the Code of Practice, which provide, that if, in order to give jurisdiction to the court, one demand less than is really due, and do not amend his petition and augment the demand, he shall be presumed to have remitted the surplus, relate to the reduction of an entire sum, as where the claim exceeds the jurisdiction of the court and is reduced so as to bring it within it. But where an amount is payable in instalments, as rent at fixed periods, a conjunctive obligation is created, and each instalment may be paid or enforced separately. So where four monthly instalments of rent are due, a suit for the amount due for the last month, will not release the lessee from the obligation to pay the rent due for preceding months.
Brandagee v. Chamberlin, 207.
4. Under the act of 10th March, 1838, sect. 4, the Presiding Judge of the City Court of New Orleans has, within the city, exclusively of justices of the peace, or of the associate justices of that court, original jurisdiction of all actions, for whatever amount, by landlords against their tenants for the possession of real property. *Kennedy v. Downey*, 284.
5. Art. 2683 of the Civil Code, authorizes justices of the peace, out of the city of New Orleans, to order the expulsion of tenants, whatever may be the value of the lease. *Ib.*
6. The privilege of the lessor on the moveables found in the house, yields only to that of the funeral expenses of the debtor and his family, and to that only when there is no other source from which it can be paid. The charges for selling the moveables, which, under art. 3223 of the Civil Code, are to be paid before the rent, are those only which are necessary or incidental to the sale of the moveables. *Montilly v. His Creditors*, 350.
7. A tenant cannot dispute the title of his lessor, nor change his possession by setting up other titles. The possession of the lessee is that of the lessor.
LeBreton v. McDonough, 461.

LOST WRITINGS.

See EVIDENCE, IX.

LOTTERY.

The grant by the legislature of a privilege to raise money by lottery, without

any limit as to time, may be restricted by a subsequent law, before any rights have been acquired under the first. The permission to draw a lottery is not, *per se*, a contract; and until it has been accepted, and rights have been acquired under it, is entirely within the control of the legislature.

Davis v. Caldwell, 271.

LUNATIC.

See DOMICIL, 1.

MINOR.

- I. *Domicil of and Court having Jurisdiction over Minor.*
- II. *Tutor and Under-Tutor.*
- III. *Emancipation of Minor.*
- IV. *Contracts of Minor.*
- V. *Mortgage in favor of Minor.*

I. *Domicil of and Court having Jurisdiction over Minor.*

1. The domicil of the tutor is that of the minor. The Court of Probates of the parish in which the minor has his domicil, is the proper tribunal to order a family meeting of the relations or friends, to determine questions affecting the interests of the minor.

State v. Judge of Court of Probates of New Orleans, 150.

2. So long as a tutrix continues to act, her domicil is that of the minor. Where the legal tutor of a minor changes his domicil after the tutorship has devolved upon him, the new domicil of the tutor will become that of the minor, for all purposes connected with the administration of the estate, and for the appointment of a successor in case of the tutor's death. *Aliter*, in France, where the tutor is dative. *Ib.* 418.
3. A minor, not emancipated, who had lived abroad for fifteen years, but who was born in this State, where his tutrix resides, is domiciled here. A minor, not emancipated, can have no other domicil than that of his father, mother, or tutor. C. C. 48. *Succession of Robert*, 427.
4. A domicil of choice can only be acquired by one who is *sui juris*; consequently, it cannot be acquired by a minor. *Ib.*
5. The consent of the tutor to the marriage abroad of an unemancipated minor, does not authorize the latter to change her domicil. Actual emancipation by marriage, could alone effect a change. Until the act or event which gives the minor the right to change his or her domicil has taken place, the domicil of the father, mother, or tutor, must be considered that of the unemancipated minor. *Ib.*

II. *Tutor and Under-Tutor.*

6. By the laws of France the widow becomes the tutrix of her minor child immediately after the death of her husband, and needs no letters of tutor-

ship to act as such ; and, by the same laws, she is entitled to the enjoyment of all the property of her child, until he reach the age of eighteen, or be emancipated. *Succession of Senac*, 258.

7. The office of under-tutor is always dative ; and no law compels any one to accept such an appointment.

State v. Judge of Court of Probates of New Orleans, 418.

8. The resignation of an under-tutor must be addressed to the Court of Probates of the parish in which the minor has his domicile ; and it is the duty of the judge of that court to accept the resignation when tendered, and to appoint his successor. *Ib.*

See V. *infra*.

III. *Emancipation of Minor.*

9. The father and natural tutor having advanced the capital for a minor child not yet emancipated, constituted her, by notarial act, a partner *in commendam*. *Held*, that the authorization to enter into the partnership, having been given by notarial act, was equivalent to an emancipation ; that the father clearly intended to give her the necessary authorization to enter into the partnership ; and that whatever words may be used, effect will be given to the intention of the father, if expressed in an act clothed with the necessary solemnities. *Jonau v. Blanchard*, 513.

IV. *Contracts of Minors.*

10. An emancipated minor may engage in trade, and he will be bound by his commercial engagements as a person of full age. C. C. 379, 1867, 2322. He may form a general partnership, as well as one *in commendam*.

Jonau v. Blanchard, 513.

11. The ratification by a husband of a contract of partnership entered into by his wife, an unemancipated minor, before marriage, will be binding on the latter, he being by law the administrator of her dower. C. C. 2327, 2329, 2330, 2334. *Ib.*

V. *Mortgage in favor of Minors.*

12. The object of the special mortgage authorized to be executed by the act of the 11th March, 1830, relative to the tutors and curators of minors, is to secure the rights and property of the minor, and the faithful administration of the tutor until his final discharge. It is a substitute for the general legal mortgage, so far as the rights of the minor are concerned ; and is special only as to the property subject to it. As soon as the special mortgage is accepted and recorded, the general mortgage resulting from the tutorship ceases to exist as to third persons, and the mass of the property will be released, though an error may have been committed in ascertaining the amount due to the minor at the time of executing the special mortgage. The latter is not restricted to the amount supposed to be due at the time it was given. The property specially mortgaged will be bound for whatever may be due from the tutor on the final settlement of his accounts. The amount found due to the minor by the Court of Probates during his minority, will not be

- conclusive upon him. The account may be opened on the final settlement of the tutorship *Barnard v. Erwin*, 407.
13. Where in order to pay the amount due to one who has attained his majority, it is necessary to sell property, specially mortgaged by a tutor under the act of 1830 to secure the rights of the minors, the property will be sold, to make the amount due to the former, subject to the mortgage in favor of the other minors. To sell the whole property for cash, and to pay over the amount due to those yet minors to their tutor, would be to defeat the very purpose of the mortgage. *Ib.*
 14. In an action against a third possessor of property, specially mortgaged by a tutor, under the act of 1830, to secure the rights of the minor and the faithful discharge of his duties as tutor, where the rights of the minor had been settled by a judgment of the Court of Probates, the plaintiff, the former minor, will be entitled to legal interest, on the amount so fixed, from the date of the judgment settling his claim. *Ib.*
 15. The legal mortgage declared by art. 3283 of the Civil Code, to exist, from the day of the first act of interference, on the property of one who, without having been appointed tutor or curator to a minor, an interdicted or absent person, interferences in the administration of the property, will not attach to the property of one who, having become the surety of a tutor on the condition that he (the surety) should administer the property, received from the tutor, in pursuance of the agreement, money belonging to his wards, which he failed to pay over. The tutor having assented to the employment of the money by his surety, the latter cannot be considered as having interfered with the administration, in the meaning of art. 3283.
Succession of De Armas, 445.
 16. The provisions of the Civil Code which establish mortgages in favor of minors, at least so far as they are tacit and exist without being recorded, are confined to persons who receive their appointments as tutors from our courts, or who, after receiving such appointments abroad, come to reside here; and in the latter case, such tacit mortgages exist only for sums received since their removal to this State. *Prats v. His Creditors*, 501.

MORTGAGE.

1. Ships and other vessels are not susceptible of being mortgaged, except according to the laws and usages of commerce. The validity of an hypothecation of them, will not be recognized in any other cases; and there is no distinction in this respect between vessels trading with foreign ports, and those which do not leave the State. *Hill v. Phœnix Tow Boat Co.*, 35.
Hill v. De Lizardi, 89.
2. A mortgagee who seeks to enforce his mortgage against third persons, must prove that it has been duly recorded. *Cassidy v. His Creditors*, 47.
3. The sale of an immoveable by the syndic of the creditors of an insolvent, cannot affect the rights of a creditor who never made himself a party to the insolvent proceedings, having a mortgage with a pact *de non alienando*. He may seize and sell the property into whosoever hands it may have

passed. But where, by appearing at the meeting of creditors and fixing the terms of sale of the mortgage property, he has made himself a party to the *concurso*, he will be considered as having waived this right, and must look to the proceeds in the hands of the syndic, whom he has made his agent.

Egerton &c. v. Their Creditors, 201.

4. Where property, subject to a special mortgage, does not sell for enough to satisfy the mortgage, the mortgagee becomes an ordinary creditor for the difference; and if there be nothing for such creditors, he must lose the surplus. *Salzman v. His Creditors*, 241.
5. The owners of notes executed each for a portion of the price of property, and secured by the same mortgage, are entitled to be paid out of the proceeds of the property, in proportion to the amount of the notes owned by them respectively. *Ib.*
6. Where the holder of a claim secured by mortgage, assigns a part of it, he cannot come in competition with his assignee, if the property prove insufficient to pay both. Though he warrant only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the price from his assignee, to prevent the latter from recovering the amount paid by him. *Ib.*
7. The possession of a promissory note, payable to order, and endorsed in blank, is *prima facie* evidence of title, the property passing by delivery. No other transfer is necessary to entitle a party to avail himself, *via ordinaria*, of a mortgage given to secure its payment; but to proceed, *via executiva*, the mortgage must be transferred by an authentic act.
Fitzwilliams v. Wilcox, 303.
8. Where a mortgage contains the clause *de non alienando*, no transfer of the property can affect the mortgagee's right to proceed against it summarily, as if still belonging to the mortgagor. *Murphy v. Jandot*, 378.

See HUSBAND AND WIFE, 11. MINOR, V. SHIPPING, 3.

MOVEABLES.

Where the rights of a party to a succession, consist only in right to a portion of the proceeds of the sale of the property, either in money, or in notes given for the price, it will be considered purely moveable; and this, though the notes should be secured by mortgage on the real estate sold. C. C. 466, 467. *Bonneau v. Poydras*, 1.

NEW ORLEANS, CITY OF.

1. Under act of 8th March, 1836, dividing the city of New Orleans into three municipal corporations, each of the Municipalities is authorized to acquire, enjoy, alienate, mortgage, or otherwise dispose of all kinds of property, real, personal, or mixed; and such purchase may be for cash, or for a price payable at a future period.

Third Municipality of New Orleans v. McDonough, 244.

2. A purchase of real estate by one of the Municipalities of the City of New Orleans, with a view to divide it into lots and streets and to re-sell the same, for the purpose of improving the cleanliness and salubrity of the city, and the convenience of the streets, is legal. Act 14 March, 1816. *Id.*
3. A bequest of a sum of money "to the orphans of the First Municipality of New Orleans," may be claimed and recovered by the City Council of that Municipality, who are authorized to regulate its distribution among the objects of the testator's bounty. C. C. 1536. *Succession of Mary*, 438.
4. Where, on an application under the act of 3d April, 1832, for the appointment of commissioners to assess the damage or advantage resulting to the owners of ground, required for the opening or improving of streets or public places in the city of New Orleans, or adjacent to such improvements, it is alleged in the petition that the proposed improvements tend to the benefit and improvement of the whole corporation, the commissioners will be relieved from the duty of inquiring whether they are of a local or general character, and the Municipality, by which they were ordered to be made, will be bound to the owners for whatever amount they would have been liable under the act, had the commissioners expressly declared such improvements to be beneficial to the whole corporation. *Application of Mayor of New Orleans, &c., for Extension of Barrack Street*, 491.

See CORPORATIONS, 1. 2.

NEW TRIAL.

Motion for a new trial by plaintiff, in an action to annul a mortgage, on the ground that the clerk of the parish judge before whom the mortgage was executed, had entered into a conversation with five of the jurors, while they were at dinner, during a recess of the court and before the argument had ended, and told them that if they annulled the mortgage their own mortgages, if they had any, would also be annulled. *Held*, that the motion was correctly overruled, there being no evidence that any fact was communicated which had not been sworn to on the trial, nor that any of the jury were interested in the question. *De Blanc v. Martin*, 82.

NOVATION.

The substitution of a second note, payable to different payees, in place of the first, is a novation of the debt. *Wellington v. Scott*, 59.

NULLITY OF CONTRACTS.

See CONTRACTS, IV.

NULLITY OF JUDGMENT.

See JUDGMENT, 2.

PARISH JUDGE.

See PRESCRIPTION, 4.

PARTIES TO ACTION.

See APPEAL, II. PLEADING II.

PARTNERSHIP.

1. Under art. 2796 of the Civil Code, which in this respect has altered the general commercial law, the joint owners of a ship or other vessel, are, in all transactions relative to the use of such vessel or for the objects of the association, as to third persons, commercial partners, and responsible as such *in solido*. *Banchor v. Bell*, 182.
2. Each of the joint owners of a steamer, or other vessel, holds an undivided share, which he may dispose of without consulting the others ; but neither can sell the interest of a co-proprietor without his consent.
Byrne v. Hooper, 229.
3. Where the joint owners of a steamer employ her in carrying merchandize for freight, they become, *quoad hoc*, commercial partners, and are liable, *in solido*, to third persons, for all debts incurred in prosecuting the business ; but the boat does not thereby cease to be the property of the joint owners, and become partnership property. The manner of employing the boat does not change the title by which it is held. It will continue to be the individual property of each of the owners. *Ib*.
4. Where a judgment has been obtained against the joint owners of a steamer, a waiver by one of the formalities required by law for the sale of the property, will not be binding on the rest. *Ib*.
5. The members of a commercial partnership have each the right to represent the firm. Service of citation on either, or admissions by either, will be binding on the rest. But where it is attempted to satisfy a judgment against the partnership out of the individual property of a member, he alone can waive the formalities required by law for its alienation. In such a case, a partner has no more authority than a stranger. *Ib*.
6. No action will lie against a partnership, for money lent to one of the partners in his own name, to be put by him into the partnership as his share of the capital, and to be repaid to the lender out of his portion of the profits of the business. The right of action exists only against the borrower, and not against the partnership, with which the lender never contracted.
Smith v. Sénécal, 453.
7. No action can be maintained by a partner against the firm, to withdraw his portion of the capital, before the expiration of the term for which the partnership was to exist. *Ib*.
8. Partnership funds must be applied to the payment of the partnership debts, in preference to debts due by a partner individually. *Ib*.
9. Where a name has been used by a partnership for the purpose of a fictitious credit, with the consent of the partner *in commendam*, the latter cannot

- avail himself of the provisions of art. 2821 of the Civil Code, to withdraw the amount advanced by him, or to free himself from responsibility either to his partner or third persons. *Jonau v. Blanchard*, 513.
10. The father and natural tutor having advanced the capital for a minor child, not yet emancipated, constituted her, by notarial act, a partner *in commendam*. Held, that the authorization to enter into the partnership, having been given by notarial act, was equivalent to an emancipation; that the father clearly intended to give her the necessary authorization to enter into the partnership; and that whatever words may be used, effect will be given to the intention of the father, if expressed in an act clothed with necessary solemnities. *Ib.*
 11. An emancipated minor may engage in trade, and he will be bound by his commercial engagements as a person of full age. C. C. 379, 1867, 2222. He may form a general partnership, as well as one *in commendam*. *Ib.*
 12. The ratification by a husband of a contract of partnership entered into by his wife, an unemancipated minor, before marriage, will be binding on the latter, he being by law the administrator of her dower. C. C. 2327, 2329, 2330, 2334. *Ib.*
 13. The dissolution of a partnership is not an act of administration, and, therefore, requires a special power. It does not come within the general powers of an agent. C. C. 2966. *Ib.*

PETITION.

See PLEADING, I. II. III. VII.

PLEADING.

- I. *Form of Action.*
- II. *Parties to Actions.*
- III. *Of the Petition.*
- IV. *Exceptions and Answer.*
- V. *Demands in Compensation and Reconvention.*
- VI. *Demand in Warranty.*
- VII. *Admissions in Pleading.*

I. *Form of Action.*

1. Where the accounts of an executor have been homologated, he can no longer be held responsible for payments made by him under the orders of the Court of Probates. Should the heir discover that payments have been made which were not due, his recourse, if he have any, is by an action *condictio indebiti*, against the party who has received what he was not entitled to; and where such payments have been made to the executor for commissions alleged to have been illegally allowed, an action to recover them may be brought against him, individually, before a court of ordinary jurisdiction. The defendant is no longer executor, nor is he sued as such.

Baldwin v. Carleton, 54.

2. A direct action is not necessary to establish the falsehood of a notarial act ; it may be shown collaterally. *De Blanc v. Martin*, 82.
3. The proceeding under sect. 13 of the act of 20 March, 1839, authorizing a plaintiff to propound interrogatories to third persons, touching any property in their possession belonging to the defendant or any debt which they may owe to the latter, cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived, by such a proceeding, of any advantage or means of defence they would have in a direct action against them. *Taylor v. Whittemore*, 99.
4. Simulated or fraudulent sales cannot be inquired into, by commencing by seizure and treating them as nullities. *Le Goaster v. Barthe*, 388.
5. Plaintiff, claiming certain lots of ground, obtained an injunction to prevent the syndic from selling them as the property of the insolvent, and prayed for its perpetuation, and for a judgment upon his title. The syndic having answered, plaintiff filed a supplemental petition, alleging that the sale, under which the insolvent set up title to the property, was simulated. On an exception that the supplemental petition tended to change the issue : *Held*, that the action was originally petitory, and the supplemental petition correctly admitted. *Ib.*

II. Parties to Actions.

6. A married woman, separated in bed and board, may sue, under the laws of this State, without the authorization of her husband or a court. Proof of the existence of the judgment of separation, is all that is requisite to establish her authority. C. C. 125, 2410. Act of 1 April, 1826, § 2.
Bonneau v. Poydras, 1.
7. Where an action had been commenced by a married woman, without the authority of her husband or of the court, who two days after obtained a judgment of separation from bed and board, on an exception to her right to sue : *Held*, that the exception should be overruled, as it would have been useless to dismiss a suit which might be commenced immediately afterwards, her disability having been removed. *Baldwin v. Union Insurance Co.*, 133.
8. The rights of a creditor claiming a privilege on property in the hands of a judicial sequestrator, cannot be determined without making such creditor a party to the suit. The judicial sequestrator does not represent him.
Bank of Alabama v. Hozey, 150.
9. Though the creditors of an estate, the property of which has been sold by order of court to pay their claims, are not, technically, warrantors of the purchaser, yet as their obligation to repay the price distributed among them depends on the eviction of the latter, their situation is analogous to that of a vendor, and they should be made parties to the action against the purchaser. The latter cannot be compelled to bring as many actions, in their different parishes, as there may be creditors liable to refund.

Rivas v. Hunstock, 187.

10. A widow, residing in France, may oppose, in the courts of this State, the homologation of the will of her husband, and stand in judgment for her child.

Succession of Senac, 258.

11. An exception that the claim is a joint one against several persons, some of whom have not been made parties, is too late after the case has been remanded for a new trial. It should have been pleaded before issue joined, on the first trial. C. P. 333. *Rothschild v. Bowers*, 380.

III. Of the Petition.

12. Arts. 91 and 156 of the Code of Practice, which provide, that if, in order, to give jurisdiction to the court, one demand less than is really due, and do not amend his petition and augment the demand, he shall be presumed to have remitted the surplus, relate to the reduction of an entire sum, as where the claim exceeds the jurisdiction of the court, and is reduced so as to bring it within it. But where an amount is payable in instalments, as rent at fixed periods, a conjunctive obligation is created, and each instalment may be paid or enforced separately. So where four monthly instalments of rent are due, a suit for the amount due for the last month, will not release the lessee from the obligation to pay the rent due for preceding months.

Brandagee v. Chamberlin, 207.

13. Where the petition prays for the rescission of a contract of sale or exchange, the plaintiff cannot be allowed either the price, or the value of the thing sold or exchanged. Restitution of the thing itself can alone be decreed.

Menefee v. Johnson, 274.

14. Plaintiff cannot amend his petition so as to change his claim for the price of certain slaves, into an action for damages for defendant's failure to give them up in compliance with his contract. C. P. 419. *Ib.*

15. A prayer for a jury is too late after the case has been set for trial. C. P. 494, 495. *Ib.*

16. Every thing must be stated in the petition, which it is necessary for the defendant to know in order to put him on his defence.

Cox v. Robinson, 313.

17. The allegation in the petition, in an action against the principal and sureties on an attachment bond, that plaintiff has sustained damages "by the wrongful attachment, seizure, and detention of the slaves attached, whereby he has been deprived of his property, and of the services and wages of the slaves," accompanied with a prayer for the amount of such damages, and for general relief, will not support a verdict for the value of the slaves. *Ib.*

18. The demand to be made on a note payable at a particular place, cannot be assimilated to the amicable demand required by the Code of Practice. The want of the latter must be pleaded to put the plaintiff on the proof of it, and a failure to establish it does not prevent his obtaining judgment, but only subjects him to the payment of the costs incurred before the appearance of the defendant. The former must be alleged and proved, or the plaintiff cannot recover. *Stillwell v. Bobb*, 327.

19. Putting the defendant *in mora*, is a condition precedent to the recovery of

damages for a passive violation of a contract. Such damages are only due after the debtor has been put in default, and the default must be alleged and proved; nor can evidence be received to prove a demand, where it has not been alleged in the petition. *McMaster v. Brander*, 408.

20. Where, in an action for damages for the non-delivery of goods, the petition contained no allegation of an amicable demand, but defendants averred, in their answer, a tender of the goods made by them subsequently to the commencement of the suit: *Held*, that the tender having been made subsequently to the filing of the petition, cannot cure the omission of an allegation of a previous demand, and give the plaintiffs a right of action. *Ib.*

IV. *Exceptions and Answer.*

21. Where in an action by a married woman, defendant excepts on the ground that plaintiff was not authorized by her husband or by a court, the only effect of the exception, if sustained, is to require the plaintiff to exhibit her authorization before proceeding farther with the case. It is immaterial at what time such authority may be obtained and produced, provided it be before the trial of the case on its merits. C. P. 320, 321.

Bonneau v. Poydras, 1.

22. Cases of *Wetmore & Co. v. Merrifield*, 17 La. 513, and *Booraem v. Merrifield*, *Ib.* 594, overruled, so far as they go to establish that in an action against the drawer of a bill, or maker of a note payable at a particular place, proof of a demand at such place is not necessary, where want of amicable demand has not been pleaded. *Stillwell v. Bobb*, 327.

See 11, 15, 18 *supra*, and 32 *infra*.

V. *Demands in Compensation and Reconvention.*

23. Damage occasioned by the institution of the suit, cannot be pleaded in reconvention. Where defendant has been injured, the remedy is by action on the bond.

First Municipality of New Orleans v. Orleans Theatre Co., 209.

24. A balance due on an unsettled account cannot be pleaded in compensation to an action on a promissory note; nor in reconvention, when unconnected with the plaintiff's claim. It must be sued for in a direct action.

Jonau v. Ferrand, 216.

25. Pleas in reconvention must be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were plaintiff in a direct action. *Ib.*

26. Action for a balance due on a contract by which plaintiffs undertook to construct a railway, the defendants, the other contracting party, agreeing to supply the lumber, and for damages for loss sustained by plaintiffs in consequence of defendants' failure to furnish the lumber. Plea in reconvention that plaintiffs had, by a subsequent contract, bound themselves to furnish the lumber. *Held*, that though different from the main action, the demand in

reconvention was incidental to the claim for damages, within the meaning of arts. 374, 375, of the Code of Practice.

Langfitt v. Clinton and Port Hudson Rail Road Co., 217.

27. In an action on a joint contract, the individual debt of one joint contractor may be pleaded in compensation of his share in the joint contract. *Ib.*
28. In an action for slander of title, defendants, who had reconvened by asserting title under a contract with plaintiff, and prayed that he might be condemned to execute a conveyance to them and to give security, as well as for damages, on the second day of the trial, but before plaintiff had concluded his evidence, moved to discontinue: *Held*, that they were entitled to discontinue the whole plea in reconvention, including the claim of title. *Walden v. Peters*, 331.

VI. Demand in Warranty.

29. In an action against the purchaser of property sold under a *fieri facias*, the parties to the original suit may be cited in warranty. Having received the purchase money, if the consideration of the sale fail by the eviction of the purchaser, they will be bound to refund; and their liability must be regulated by arts. 2599 of the Civil Code, and 711 of the Code of Practice.

Rivas v. Hunstock, 187.

30. The omission by a purchaser, to notify his vendor, or those who are responsible to him in case of eviction, of the action instituted against him, will not, under arts. 2494 of the Civil Code, and 388 of the Code of Practice, release the latter, unless they can show that they had means to defeat the action, which were not used owing to their not having been cited in warranty, or apprized of the institution of the suit. By the word *means* in art. 2494 of the Civil Code, must be understood new facts, or peremptory exceptions, which, if presented to the court, would have produced a different result. It will not be sufficient to show that there was error in the judgment, for the same judgment would have been pronounced against them, had they been cited. *Ib.*
31. A wife can in no case sell to her husband, or contract towards him the obligations of a vendor, though the husband may, in some cases, sell to her. She cannot, consequently, be cited in warranty by the representative of her deceased husband. *Wherry v. Bell*, 225.

See 9, *supra*.

VII. Admissions in Pleading.

32. The members of a commercial partnership have each the right to represent the firm. Admissions by either, will be binding on the rest.
Byrne v. Hooper, 229.
33. The plea of the general issue in an action against the acceptors of a bill of exchange, admits their signature, which is all that the plaintiff was bound to prove. *Carmena v. Peyroux*, 303.

PLEDGE.

1. The authority given by law to the Cashiers of Banks to execute acts of pledge, confers on those officers only the powers of Notary Publics in relation to such contracts ; and none of the forms essential to the contract can be dispensed with. *Robinson v. Shelton*, 277.
2. It is essential to the validity of a pledge, as to third persons, that notes or other obligations payable to bearer or order, which form the subject of the pledge, should be endorsed by the payee or pledgor. C. C. 3128. *Ib.*

See PRESCRIPTION, 3.

PRESCRIPTION.

1. Parol evidence is admissible to sustain a plea of prescription, by establishing possession, its character, and other requisites to sustain the plea ; or to disprove it, by showing that the party did not possess as owner, or had renounced the benefit of prescription.
Kittridge v. Landry, 72. *Kittridge v. Dugas*, 85.
2. Action against defendant as drawer of certain notes and endorser of others. Plea of prescription, and proof of promise by defendant, within the time necessary to prescribe, to give his notes for the debt, payable at a short time ; but no evidence of notice of the protest of the notes on which he was endorser, nor that he was aware of his discharge at the time of the promise : *Held*, that defendant was bound for the notes of which he was drawer, but discharged as to those on which he was endorser. To render promises to pay binding on an endorser who has been discharged, it must be proved that he was aware of his discharge, at the time of the promise.
Tomes v. Montanye, 158.
3. An action to rescind a contract of sale or pledge made by an insolvent, on the ground of its having been executed with intent to give a preference to certain creditors, is prescribed by one year. C. C. 1982.
Robinson v. Shelton, 277.
4. Under the act of 10th of March, 1834, all informalities connected with any public sale by a parish judge, sheriff, auctioneer, or other public officer, are prescribed by the lapse of five years. *Drouet v. Rice*, 374.
5. A purchaser who shows a judgment, execution and sale, under which he holds, has a title sufficient to acquire by the prescription of ten and twenty years ; and no informalities in the sale can affect his title, where he has possessed under it the time required by law to acquire the property by prescription, before such informalities were set up. *Walden v. Canfield*, 466.
6. One who left the State to discharge the duties of a Senator of the United States, and who, on resigning, was made a member of the President's Cabinet, and subsequently a Foreign Minister, will not be considered as having lost his domicile in this State, where no act has been done evincing any intention to acquire a new domicile (C. C. 46) ; and prescription will run against him, as if actually within the State. *Ib.*

PRESUMPTION.

See EVIDENCE, IV.

PRISON BOUNDS, BOND TO KEEP.

Action against defendants as sureties on a prison bounds bond, signed by them but not by the principal: *Held*, that the bond was incomplete until signed by all the parties intended to be bound, and that until so signed either might repudiate it; that being a contract of suretyship, it could not exist without the correlative obligation of the principal; and that were the defendants to pay the amount of the bond, they would not be subrogated to the rights of the plaintiffs against their debtor, as they were not bound with or for them. Suit dismissed. *Curtis v. Moss*, 367.

PRIVILEGE.

1. Ships and other vessels are not susceptible of being mortgaged, except according to the laws and usages of commerce. The validity of an hypothecation of them will not be recognized in any other cases; and there is no distinction in this respect between vessels trading with foreign ports, and those which do not leave the State.

Hill v. Phoenix Tow Boat Co., 35. *Hill v. De Lizardi*, 89.

2. Advances made to the owner, and applied to the use of a vessel, confer no privilege on the creditor. Such a claim is not embraced in any of the classes provided for by article 3204 of the Civil Code enumerating the debts privileged against ships or other vessels. The creditor is not subrogated to the rights of those whose privileged claims may have been paid out of the money advanced by him. *Hill v. Phoenix Tow Boat Co.*, 35.
3. Builders who contract with tenants for alterations or repairs of the premises leased, have no lien or privilege on the premises. There is no privity between the builder and the owner. *Sewall v. Duplessis*, 66.
4. Art. 2697 of the Civil Code, which declares that a lessee may remove the improvements and additions he has made to the thing let, provided he leave it in the state in which he received it, cannot be extended by implication to builders who contract with such lessees. Such contractors must be considered as having done the work on the personal credit of the lessee; and they have no right to remove the materials used in such repairs and improvements, on the ground that they have not been paid for. *Ib.*
5. Plaintiffs attached certain cotton as the property of defendants. Proof that it had been previously sold by defendants to intervenor, who had given a note for the price, which was protested at maturity, and still unpaid. The sheriff's return showed that he had "attached seventy bales of cotton, which was subsequently released on the execution of a bond by the consignees." Urged, on behalf of plaintiffs, that though the attachment could not hold the cotton, it was good as to defendants' privilege as vendors.

Held, that the return showed that no such right had been attached ; and that the lien, if any existed, attached to the cotton, which had been sold.

Slocomb v. Real Estate Bank of Arkansas, 92.

6. A third person, not a creditor, having advanced money to defendants, at an usurious interest, on certain articles held as security for its re-payment, which advances were applied to the benefit of the creditors of the latter, on a seizure by plaintiffs under an execution against defendants : *Held*, that such third person ought to lose the usurious interest exacted by him ; and that the difference between the sum advanced and the real value of the articles, is all that was liable to seizure. *Taylor v. Whittemore*, 99.
7. The act of the 28th Feb. 1831, authorizing the Police Juries of Pointe Coupée and certain other parishes, to cause the necessary work to be done to the roads, levees, bridges, &c., in those parishes, gave a summary remedy to the undertaker employed by the Police Jury, and extraordinary powers to the Parish Judge to issue orders of seizure and sale for any amount in such cases. But where, from any informality in the proceedings, such summary process cannot be issued, the Police Jury may nevertheless recover, *via ordinaria*, from the proprietor of the estate, at least so far as such work has been advantageous to him, the cost of works which both his interest and the general safety required to be executed. But such recovery cannot be had under proceedings before the Parish Judge, commencing with an order of seizure and sale under the act of 1831, by changing the executory into ordinary process, the Parish Judge having no jurisdiction of the question presented in an action, *via ordinaria*.

Police Jury of Pointe Coupée v. Gardiner, 139.

8. Section 4, of art. 3216 of the Civil Code, gives a privilege on the land for improvements to the levees, bridges, roads, &c., not only to one who has made such improvements by contract or job, but to any one who has applied his own labor to that purpose under the authority of the police regulations ; and where work has been done, which the regulations of police require the owner himself to perform, and by which the land has been rendered more valuable, the land itself will be affected by the privilege, which, if recorded in the proper office, will pass with it into the hands of third persons. Where the work has been regularly adjudicated and done by the job, the amount for which a privilege exists, is liquidated ; otherwise, it must depend on the proof of its utility to the proprietor ; and in an action on a *quantum meruit* evidence will be admissible to show the increased value of the land. *Ib.*
9. The rights of a creditor claiming a privilege on property in the hands of a judicial sequestrator, cannot be determined without making such creditor a party to the suit. The judicial sequestrator does not represent him.
Bank of Alabama v. Hozey, 150.
10. A sequestration, whether conventional or judicial, creates no lien or privilege. It is merely a conservative measure. The possession of the sequestrator is that of the party legally entitled to it ; and in all cases the party against whom it has been obtained, may release the property, by giving bond with surety. *Ib.*

11. No privilege or lien is created on the fees of office due to a sheriff, by his official defalcations. The debts due to him, on whatever account, form, together with his other property, a common fund, out of which all his creditors are to be paid. *Ib.*
12. The owners of notes executed each for a portion of the price of property, and secured by the same mortgage, are entitled to be paid out of the proceeds of the property, in proportion to the amount of the notes owned by them respectively. *Salzman v. His Creditors*, 241.
13. Under the Code of 1808, book 3, title 19, article 77, the vendor's privilege was postponed to the law charges in general. By the new Code, the vendor is paid out of the proceeds, of the thing sold, before other privileged claims, except the charges for affixing seals, for making inventories, and others necessary to procure the sale of the thing. C. C. 3234.
Monrose v. His Creditors, 280. *Lauve v. His Creditors*, 527.
14. The claim of a consignee, for advances, is superior to that of an attaching creditor, where the former had received a bill of lading previous to the attachment. But proof of such advances will not defeat the attachment of the latter, who will be entitled to any surplus after payment of the advances and necessary expenses. *Park v. Porter*, 342.
14. The privilege of the lessor on the moveables found in the house, yields only to that for the funeral expenses of the debtor and his family, and to that only when there is no other source from which it can be paid. The charges for selling the moveables, which, under art. 3223 of the Civil Code, are to be paid before the rent, are those only which are necessary or incidental to the sale of the moveables. *Montilly v. His Creditors*, 350.

PROHIBITION.

1. The right of inquiring into the sufficiency of the surety on an appeal bond, and of deciding whether the appeal shall be suspensive or devolutive, is exclusively within the province of the court from which the appeal is taken. The sufficiency of the security may be tried, on motion; and, if an error be committed by the court in refusing to make the appeal suspensive and authorizing the issuing of execution, the remedy is by a writ of prohibition.
Stanton v. Parker, 550.
2. Plaintiffs having issued execution against defendants, took a rule on the latter to show cause why they should not be ordered to produce their books, that plaintiffs might inspect them. The rule was made absolute, and the sheriff ordered to seize the books. On an application by defendants for a writ of prohibition: *Held*, that if they had sustained or apprehended irreparable injury, their remedy was by appeal.

State v. Judge of Commercial Court, 586.

PROVISIONAL SEIZURE.

Plaintiff having obtained a writ of provisional seizure, caused it to be levied

on a debt due to defendant by a third person, which the sheriff, without any order of court, released, on the execution of a bond by the defendant, with security, for the restoration of the property, and satisfaction of any judgment which the plaintiff might obtain. The bond was assigned to the plaintiff, but no evidence offered to prove that he accepted the assignment. *Held*, that the release was illegal, and the sheriff responsible to the plaintiff for the amount of the seizure. *Fernandez v. McVittie*, 239.

PUBLIC LANDS OF THE UNITED STATES.

1. Under the seventh sect. of the act of Congress of 11th May, 1820, reviving sect. 5 of the act of 3d March, 1811, authorizing the owner of any tract of land bordering on a water course in the territory of Orleans, to purchase, by preference, any vacant land in the rear of and adjacent to his tract, not exceeding a certain quantity, plaintiff, whose front tract had not then been surveyed, purchased, a few days before the expiration of the act, the quantity of land which he supposed himself entitled to claim. The seventh sect. of the act of 1820, having been revived and continued in force for eighteen months by sect. 1 of the act of 28th of Feb., 1823, and plaintiff having within that time discovered that he had not entered as much land as he was entitled to, he applied for and purchased the additional quantity, a survey of which, by a surveyor of the United States, approved by the Principal Deputy Surveyor in the district, was deposited in the Surveyor General's office. When the public lands were surveyed, long after plaintiff's purchases, the surveyors marked the first purchase on the township plats, but omitted the second, so that the land embraced by it appeared to be public; in consequence of this omission, defendant, a settler on the public lands, purchased a portion of the land included in plaintiff's second purchase, under the act of 19th June, 1834, granting pre-emption rights. *Held*, that having omitted, through error, to purchase, at first, the whole quantity of land to which he was entitled, and having availed himself of the discovery of his error in a short time afterwards, and before any one had taken advantage of it, or acquired any right to the land, plaintiff was entitled to purchase the additional quantity; and that the operations of the surveyors should not be allowed to take from, nor add to the rights and claims of individuals, when recognized by the proper officers of the United States.

Kittridge v. Breaud, 40.

2. Arts. 2242 and 2417 of the Civil Code, which provide that a sale of immoveable property shall have effect against third persons, only from the day when it was registered in the office of a notary and the actual delivery of the thing took place, do not apply to titles derived from the United States, which has offices of its own for the disposition of its domain, and for the preservation of the records of whatever is done in relation thereto. *Ib.*
3. The seventh section of the act of Congress of 11th May, 1820, reviving sect. 5 of the act of 3d March, 1811, authorizing the owner of any tract of land bordering on a water course in the territory of Orleans, to purchase,

by preference, any vacant land not exceeding a certain quantity, in the rear of and adjacent to his tract, continued in force by sect. 1 of the act of 28th Feb., 1823, requires that the land to which such privilege is given, should be included within limits produced by the extension of the side lines of the front tract in the same direction; it contemplates no variation, but in the event of its being found necessary to divide the back lands among several claimants. *Kittridge v. Landry*, 72. *Kittridge v. Dugas*, 85.

4. Surveys made by surveyors in the service of the United States, though sanctioned by the Principal Deputy Surveyor of the District, may be corrected when erroneous. *Ib.*

QUASI CONTRACTS.

An heir to whose benefit the payment, by a third person, of a debt due by the ancestor, has enured, will be bound to refund the amount.

Wherry v. Bell, 225.

QUASI OFFENCES.

1. Where a collision between steamers or other vessels was the result of accident, the loss must be borne by the party on whom it has fallen. Where both were in fault, the damage must be divided. Where one only was to blame, the whole loss must be borne by him. *Brickell v. Frisby*, 205.
2. The plaintiff in a petitory action who has reasonable ground to believe that he has good cause of action, will not be liable in damages on discontinuing or losing his case. *Walden v. Peters*, 331.

RECONVENTION.

See PLEADING, V.

REDHIBITION.

See SALE, V.

REGISTRY.

1. It will be no objection to the admissibility in evidence of an act, executed by plaintiff's vendor, in relation to the land in dispute, that no evidence was adduced of its having been recorded in the office of the parish judge, without which it could have no effect against third persons. Whether the act is binding on the plaintiff, is a question going to the effect, and not to the admissibility of the instrument.

Kittridge v. Landry, 72. *Kittridge v. Dugas*, 85.

2. A notarial act, by which it was agreed that certain lines should form the boundary between the lands claimed by the parties thereto, not recorded in

the office of the Parish Judge, is void as to third persons, or innocent purchasers without notice. *Ib.*

3. A sale by a sheriff of an immoveable, seized under a *fi. fa.*, is void as to third persons not proved to have had actual notice, when it has not been recorded in the office of the Register of Conveyances as required by law.

Murphy v. Jandot, 378.

RESCISSION.

See CONTRACTS, IV. SALE, V.

RULE TO SHOW CAUSE.

1. Execution having been issued against defendant in an action on a note secured by mortgage, the proceedings were enjoined by a third person, the real owner of the mortgaged property, and the real debtor of the amount of the note; and a judgment was entered by consent, recognizing the property as belonging to the intervenor, and ordering its sale. The sale made in pursuance of this judgment having been set aside for irregularity, plaintiffs took a rule on intervenor to show cause why a *pluries fi. fa.* should not be issued. On an answer by the latter alleging the illegality of the judgment, and denying plaintiffs' right to proceed in the manner adopted by them, and praying for a trial by jury: *Held.* that the rule presented no issue or question of fact for a trial by jury, and that such trial was correctly refused. *Hobson v. Bein*, 109.
2. A rule to show cause why the terms of a judicial sale should not be complied with, or the property again sold at the risk of the first purchaser, made absolute, the effect of which would be to annul a sale made by a competent officer, can have no effect unless signed by the judge.
Gallier v. Garcia, 319.
3. The answer to a rule to show cause taken against the judge of an inferior court, must be in writing, and filed with the clerk of the Supreme Court. No answer in person, or oral discussion will be listened to, except from the parties interested, or their counsel.

State v. Judge of Court of Probates of New Orleans, 418.

SALE.

- I. *Form and Requisites of a Sale, and Persons Capable of Buying and Selling.*
- II. *Delivery.*
- III. *Rights and Privilege of Vendor.*
- IV. *Warranty.*
- V. *Rescission on account of Redhibitory Defects, Fraud, &c.*
- VI. *Sale à la Folle Enchère.*
- VII. *Sale Per Aversionem.*
- VIII. *Judicial Sales.*

I. *Form and Requisites of a Sale, and Persons Capable of Buying and Selling.*

1. The power to sell or compromise, must be express and special. C. C. 2966.

Bonneau v. Poydras, 1.

2. Arts. 2242 and 2417 of the Civil Code, which provide that a sale of immoveable property shall have effect against third persons, only from the day when it was registered in the office of a notary and the actual delivery of the thing took place, do not apply to titles derived from the United States, which has offices of its own for the disposition of its domain, and for the preservation of the records of whatever is done in relation thereto.

Kittridge v. Breaud, 40.

3. Payment of the price is not essential to the contract of sale.

Slocumb v. Real Estate Bank of Arkansas, 92.

4. A wife can in no case sell to her husband, nor contract towards him the obligations of a vendor, though the husband may, in some cases, sell to her. She cannot, consequently, be cited in warranty by the representative of her deceased husband. *Wherry v. Bell*, 225.

5. Each of the joint owners of a steamer, or other vessel, holds an undivided share, which he may dispose of without consulting the others; but neither can sell the interest of a co-proprietor without his consent.

Byrne v. Hooper, 229.

6. Defendant purchased certain shares of stock in the Union Bank of Louisiana, binding himself to pay plaintiffs a balance due thereon by his vendor. In the contract of sale the latter bound himself to transfer the stock to defendant on the books of the Bank. On an application to the Board of Directors, under the 29th section of the act of 2d April, 1833, incorporating the Bank, to allow a transfer of the stock, the proposition was approved by a majority of the Board, as required by law. The Bank having subsequently sued for the amount due on the stock assumed by defendant, the latter pleaded that he could not be made liable till the stock was transferred to him. *Held*, that the stipulation that the vendor should transfer the stock on the books of the Bank, meant only that he should cause the defendant to be recognized as a stockholder on its books; and that the contract was complete as to all parties interested, on the execution of the act of sale made under the authority of the Directors.

Union Bank of Louisiana v. Desban, 486.

7. The vendee may, generally, establish the sale, by proof of the acts and admissions of his vendor. Where fraud is suspected, the admissions of the alleged vendor, must be received with caution, but cannot be absolutely rejected. *Planters Bank of Mississippi v. Crane*, 489.

8. A fixed price is one of the legal requisites of a contract of sale; and though it be agreed that the price shall be fixed by a third person, if it become impossible, or be not done, the contract will remain imperfect.

Tiernan v. Martin, 523.

See CONTRACTS, 4.

II. *Delivery.*

9. Defendants advertised for sale, "the hull, spars, sails, and rigging, of the schooner Louisiana, lying high and dry on a certain island." The advertisements represented, "that she was well found, her sails unbent, and her running rigging stowed below; that there was some cargo on board, which might entitle the purchaser to an advantageous salvage; and that she was left in the charge of three trusty persons." Plaintiffs purchased, and four days afterwards proceeded to the wreck, which they found at a different place from that advertised, and burnt to the water's edge. A witness deposed that it had, from all appearances, been burnt before the sale. *Held*, that if the burning occurred before the day of sale, there was no sale (C. C. 2430); if after, but before possession could have been taken with reasonable diligence, that defendants were liable, under arts. 2443, 2444, for the acts or neglect of the persons they announced as keeping her; that the delay of four days was not unreasonable; and that defendants having, to enhance the price, made representations, in the nature of a warranty, calculated to mislead the purchasers, were responsible for the expenses to which the latter were subjected through their fault.

Bataille v. Firemen's Insurance Co., 60.

10. A party having purchased of plaintiffs a quantity of flour for cash, to be shipped on a vessel bound to a foreign port, it was delivered on board and receipts taken for it in the name of the plaintiffs. The purchaser never paid for the flour; but obtained from the master of the vessel, to whom he consigned it, bills of lading therefor, without having produced the receipts given to the vendor, and an advance to be repaid with commissions and freight. In an action by plaintiffs against the master to recover the flour: *Held*, that it is an established usage, where goods are purchased for cash to be shipped for exportation, for the vendor to take the receipts of the officers of the vessel in his own name, to be delivered to the purchaser when the price is paid, that the latter may obtain a bill of lading from the master on their production; that the possession of the flour never ceased to be in the plaintiffs; and that the master acted in his own wrong in giving a bill of lading to the purchaser, and in making advances before delivery to the latter had been effected by the surrender of the dray receipts to him.

Landis v. Darling, 70.

11. Where no place is designated for the delivery of articles ordered of a manufacturer, delivery is to be made at the place where they are manufactured.

Leeds v. Bredall, 105.

III. *Rights and Privilege of Vendor.*

12. Plaintiff attached certain cotton as the property of defendants. Proof that it had been previously sold by defendants to intervenor, who had given a note for the price, which was protested at maturity, and still unpaid. The sheriff's return showed that he had "attached seventy bales of cotton, which was subsequently released on the execution of a bond by the con-

signees." Urged, on behalf of plaintiffs, that though the attachment could not hold the cotton, it was good as to defendants' privilege as vendors. *Held*, that the return showed that no such right had been attached; and that the lien, if any existed, attached to the cotton, which had been sold.

Slocomb v. Real Estate Bank of Arkansas, 92.

13. The owners of notes executed each for a portion of the price of property, and secured by the same mortgage, are entitled to be paid out of the proceeds of the property, in proportion to the amount of the notes owned by them respectively. *Salzman v. His Creditors*, 241.
14. Under the Code of 1808, book 3, title 19, article 77, the vendor's privilege was postponed to the law charges in general. By the new Code, the vendor is paid out of the proceeds of the thing sold before other privileged claims, except the charges for affixing seals, for making inventories, and others necessary to procure the sale of the thing. C. C. 3234.
Monrose v. His Creditors, 280. *Lauve v. His Creditors*, 527.
15. The holder of a note given for the price of a slave, will be entitled to interest from maturity, though the note contained no stipulation to that effect, and was not protested. C. C. 2531, 2532. *Gay v. Kendig*, 472.

IV. Warranty.

16. Though the creditors of an estate, the property of which has been sold by order of court to pay their claims, are not, technically, warrantors of the purchaser, yet as their obligation to repay the price distributed among them depends on the eviction of the latter, their situation is analagous to that of a vendor, and they should be made parties to the action against the purchaser. The latter cannot be compelled to bring as many actions, in their different parishes, as there may be creditors liable to refund. *Rivas v. Hunstock*, 187.
17. In an action against the purchaser of property sold under a *feri facias*, the parties to the original suit may be cited in warranty. Having received the purchase money, if the consideration of the sale fail by the eviction of the purchaser, they will be bound to refund: and their liability must be regulated by arts. 2599 of the Civil Code, and 711 of the Code of Practice. *Ib.*
18. By art. 2602 of the Civil Code, all the warranties to which private sales are subject, exist against the heirs in judicial sales of the property of successions. *Aliter* as to the creditors, on the sale of the property surrendered by an insolvent. The heirs are warrantors to the fullest extent, being owners and vendors, while the creditors are neither. The latter are only responsible, severally, for the restitution of the proceeds of the sale of the property received by them. *Ib.*
19. The omission by a purchaser, to notify his vendor, or those who are responsible to him in case of eviction, of the action instituted against him, will not, under arts. 2494 of the Civil Code, and 398 of the Code of Practice, release the latter, unless they can show that they had means to defeat the action, which were not used owing to their not having been cited in warranty, or apprized of the institution of the suit. By the word *means*, in art.

2494 of the Civil Code, must be understood new facts, or peremptory exceptions, which, if presented to the court, would have produced a different result. It will not be sufficient to show that there was error in the judgment, for the same judgment would have been pronounced against them, had they been cited. *Ib.*

20. Where the holder of a claim secured by mortgage, assigns a part of it, he cannot come in competition with his assignee, if the property prove insufficient to pay both. Though he warrant only the existence of the debt at the time of the transfer, it would be contrary to good faith, to permit him, after receiving the price from his assignee, to prevent the latter from recovering the amount paid by him. *Salzman v. His Creditors*, 241.

V. Rescission on account of Redhibitory Defects, Fraud, &c.

21. Where, after a protracted illness, a disease, which existed at the time of the sale, assumes a new and different character, and finally causes the death of a slave, there may be reason to doubt the vendee's right to recover in a redhibitory action. *Aliter*, where the evidence proves that the death was the consequence of the original disease. *Lyons v. Kenner*, 50.
22. Defendant having purchased a lot of negroes, in other respects sound, on placing them in the railway cars to be transported to his plantation, a distance of sixteen miles, discovered in one of them the first symptoms of the measles. The one thus affected was not separated from the rest, either in the cars or on his plantation, and no physician was sent for until four days had elapsed, when another was found ill of the same disease. Both of these, and two others, died of the disease. In an action by the vendor for the price: *Held*, that the measles is not an incurable malady; that defendant, by neglecting to separate the sick girl from the other slaves after notice of the disease, and by omitting to call in medical aid at once, failed to act as a man of ordinary prudence would have done; and that the presumption created by sect. 3, of the act of 2 January, 1834, as to slaves who have been less than eight months in the State, that any redhibitory malady which displays itself within fifteen days after the sale, existed on the day thereof, does not apply to such a case. *Ib.*
23. To recover in a redhibitory action, a purchaser must show that he acted with, at least, ordinary care and attention, and that no act or omission of his could have occasioned the loss he attempts to throw upon his vendor. *Ib.*
24. Proof of circumstances calculated to create doubt as to the fairness of the transaction, will not be sufficient to set aside a sale.
Slocumb v. Real Estate Bank of Arkansas, 92.
25. Two things are necessary to constitute fraud: the intention to defraud, and actual loss or damage, or such strong probability of it as will induce a court to interfere. *Ib.*
26. An action to rescind a contract of sale made by an insolvent, on the ground of its having been executed with intent to give a preference to certain creditors, is prescribed by one year. C. C. 1982. *Robinson v. Shelton*, 277.

27. Simulated or fraudulent sales cannot be inquired into, by commencing by seizure and treating them as nullities. *LeGoaster v. Barthe*, 388.

See CONTRACTS, 7. 8. 9. 10.

VI. *Sale à la Folle Enchère.*

28. A sale *à la folle enchère*, must be on the same terms and conditions as the first, or it will be annulled. *Gallier v. Garcia*, 319.

VII. *Sale Per Aversionem.*

29. The sale of a tract of land described as having seventeen *arpens* front on the river, by a depth determined by the titles, bounded on the upper side by the plantation of D., and on the lower by that of L., is a sale *per aversionem*; and, having been made with reference to known and definite boundaries, conveys nothing more than is contained within those limits, and a deficiency in quantity will not entitle the purchaser either to a rescission of the sale, or to a diminution of the price. C. C. 2471. *Saulet v. Trepagnier*, 357.
30. Where one who sells a certain quantity of land, afterwards fixes the boundaries himself, the purchaser will take all the land between the boundaries. C. C. 850. *LeBreton v. McDonough*, 461.

VIII. *Judicial Sales.*

31. The purchaser at a judicial sale of the property of a succession sold for a debt due by the ancestor, will, where the proceedings have been fairly conducted, acquire a title good against an heir who may subsequently make himself known. *Wherry v. Bell*, 225.
32. Where property sold under execution at twelve months' credit, and conveyed to the purchaser, is resold on account of the failure of the latter to pay the price, the first purchaser, or his heirs alone, can avail themselves of any irregularities in the second sale. The original owner, having been divested of his title, by the first adjudication, cannot take advantage of any illegality in the second sale. *Drouet v. Rice*, 374.
33. A scrawl, enclosing the letters L. S., affixed to a *fi. fa.*, will be good as a seal, where, from being used in other writs issued from the same court, it is to be presumed that the court had no engraved seal. *Ib.*
34. A sheriff's deed, under the act of 10th April, 1805, headed with the title of the suit under which the property was sold, and referring to the *fi. fa.* which recites the judgment and mentions the court by which it was rendered, contains a sufficient reference to the judgment under which the writ was issued. *Ib.*
35. After the lapse of twenty years, the legal presumption is in favor of the acts of sheriffs. Proceedings for the forced alienation of property under the former laws of this State, will not be scrutinized with the same rigor as those under the present system, the formalities required by which are well defined in the Code of Practice. *Ib.*
36. Under the act of 10th of March, 1834, all informalities connected with any

public sale by a parish judge, sheriff, auctioneer, or other public officer, are prescribed by the lapse of five years. *Ib.*

37. A sale by a sheriff of an immoveable, seized under a *fi. fa.*, is void as to third persons not proved to have had actual notice, when it has not been recorded in the office of the Register of Conveyances as required by law.

Murphy v. Jandot, 378.

38. A purchaser who shows a judgment, execution, and sale under which he holds, has a title sufficient to acquire by the prescription of ten and twenty years; and no informalities in the sale can affect his title, where he has possessed under it the time required by law to acquire the property by prescription, before such informalities were set up. *Walden v. Canfield*, 466.

SEIZURE AND SALE, ORDER OF.

See EXECUTORY PROCESS.

SEQUESTRATION.

1. A return of no property found after demand of the parties, made by the sheriff on a *fi. facias* against the defendant, in an action in which sequestered property had been released on a bond, is sufficient evidence of a breach of the condition of the bond given for the release of the property sequestered, in an action against the surety. *Massé v. Barthet*, 69.
2. The rights of a creditor, claiming a privilege on property in the hands of a judicial sequestrator, cannot be determined without making such creditor a party to the suit. The judicial sequestrator does not represent him.
Bank of Alabama v. Hozey, 150.
3. Where property in the hands of a judicial sequestrator, has been seized under process from another court than that which issued the sequestration, the former tribunal may pronounce upon the validity of the seizure, though it have no power to order a release of the sequestration. *Ib.*
4. A sequestration, whether conventional or judicial, creates no lien or privilege. It is merely a conservative measure. The possession of the sequestrator is that of the party legally entitled to it; and in all cases the party against whom it has been obtained, may release the property, by giving bond with surety. *Ib.*

See APPEAL, 4.

SHERIFF.

1. No privilege or lien is created on the fees of office due to a sheriff, by his official defalcations. The debts due to him, in whatever amount, form together with his other property, a common fund, out of which all his creditors are to be paid. *Bank of Alabama v. Hozey*, 150.
2. Plaintiff having obtained a writ of provisional seizure caused it to be levied on a debt due to defendant by a third person, which the sheriff, without any order of court, released, on the execution of a bond by the defendant,

with security, for the restoration of the property, and satisfaction of any judgment which the plaintiff might obtain. The bond was assigned to the plaintiff, but no evidence offered to prove that he accepted the assignment. *Held*, that the release was illegal, and the sheriff responsible to the plaintiff for the amount of the seizure. *Fernandez v. McVittie*, 239.

3. To obtain a judgment against a sheriff with damages for his failure to return an order of seizure and sale on or before the return day, as required by the act of 7th April, 1826, sect. 27, it must be shown that a writ of seizure and sale was actually placed in his hands, and that he failed to return it on the return day mentioned therein. A statement in the judgment appealed from, that a writ was issued, is not sufficient. Such statements are not evidence. *Destréhan v. Garcia*, 291.
4. Where property has been seized under a *fi. fa.*, the sheriff may proceed to sell though the return day has passed, or the writ itself has been returned into court; and payment to the sheriff, under such circumstances, for the purpose of liberating the property seized, will discharge the debt.

Byrne v. Taylor, 441.

5. Where, subsequently to the execution of the official bond of a sheriff, a new office is created, by which his duties and emoluments are altered or diminished, his sureties will be discharged from any liability, either to the State or to third persons, for his future conduct. The contract cannot be changed without their consent; and no act was required to be done, on their part, to exempt them from future responsibility. *Roman v. Peters*, 479.
6. Errors in the return of process should be amended so as to make the return conform to the truth; and the party entitled to demand such amendment, cannot be deprived of the right, by the expiration of the term of service of the sheriff or deputy sheriff who committed the error. Nor is it any objection that the amendment will affect rights acquired by third persons.

Elmore v. Bell, 484.

7. A sheriff may amend his return, even after a contest in which its validity is attacked. *Ib.*
8. The sureties in a sheriff's bond, are not entitled to notice of the default of their principal. *Dougherty v. Peters*, 534.
9. Whoever may be aggrieved by the official misconduct of a sheriff, has a direct action against each and every one of the sureties on his official bond, and is entitled to recover such an amount as will indemnify him, and no more; nor can such sureties be compelled to pay into court, the amounts for which they may be ultimately made liable.

Inhabitants of New Orleans v. Hozey, 552.

See SALE, 34. 35. 36. 37.

SEIZURE AND SALE.

See EXECUTORY PROCESS.

SEPARATION OF PROPERTY, AND FROM BED AND BOARD.

See HUSBAND AND WIFE, 2. 3. 5. 9.

SHIPPING.

1. Ships and other vessels are not susceptible of being mortgaged, except according to the laws and usages of commerce. The validity of an hypothecation of them will not be recognized in any other cases; and there is no distinction in this respect between vessels trading with foreign ports, and those which do not leave the State. *Hill v. Phœnix Tow Boat Co.*, 35. *Hill v. De Lizardi*, 85.
5. Advances made to the owner, and applied to the use of a vessel, confer no privilege on the creditor. Such a claim is not embraced in any of the classes provided for by article 3204 of the Civil Code, enumerating the debts privileged against ships or other vessels. The creditor is not subrogated to the rights of those whose privileged claims may have been paid out of the money advanced by him. *Hill v. Phœnix Tow Boat Co.*, 35.
3. The object of an hypothecation bond is to procure the necessary supplies for vessels in distress in foreign ports, where the master and owners are without credit, and in cases in which, if assistance could not be procured by such means, the vessel and cargo might perish. *Ib.*
4. The master and owners of a vessel are not responsible for damage to the cargo occasioned by the perils of the sea, where no proof is adduced of want of care in stowing. *Lemaitre v. Merle*, 402.
5. As a general rule, where goods are acknowledged to have been received in good order, and are delivered in bad, the carrier will be responsible; but he may show that the damage arose from causes which existed before the bailment, or from the defects of the thing itself.

McIntosh v. Gastenhofer, 403.

See INSURANCE, 8. 9. 10. 11. 12. SALE, 10.

PARTNERSHIP, 1. 2. 3. 4. 5.

SLANDER.

I. *Slander generally.*II. *Slander of Title.*I. *Slander generally.*

1. To recover in an action of slander, malice in defendant must be proved.

Boullemet v. Philips, 365.

II. *Slander of Title.*

2. Plaintiff having offered, through a broker, to sell a piece of property for a fixed price, placed a written memorandum in the hands of the latter, speci-

fyng the conditions. A list of persons willing to purchase on the terms proposed, with the proportion which each would take, and the names of their respective endorsers, was subsequently approved and signed by the plaintiff. These memoranda having been placed in the hands of a notary to prepare an act of sale, the completion of the sale was arrested in consequence of a difficulty raised by the defendants as to the validity of plaintiff's title. *Held*, that the facts prove a contract binding on the parties; and that the assertion of title to the premises by the defendants, under such circumstances, and with such evidence of right, could not subject them to damages for slander of plaintiff's title. *Walden v. Peters*, 331.

3. In an action for slander of title, plaintiff must prove malice in the defendant. But where it appears that the latter had no color of title at the time, malice may, perhaps, be inferred. *Ib.*
4. No action for slander of title can be maintained, where defendant has good reason to believe that he was the real owner of the property. *Ib.*
5. The principal object of a suit for slander of title is to compel the defendant either to waive all right, or to institute suit and thereby enable the plaintiff to establish his title. *Ib.*
6. In an action for slander of title, defendants, who had reconvened by asserting title under a contract with plaintiff, and prayed that he might be condemned to execute a conveyance to them or to give security, as well as for damages, on the second day of the trial, but before plaintiff had concluded his evidence, moved to discontinue. *Held*, that they were entitled to discontinue the whole plea in reconvention, including the claim of title. *Ib.*

SPAIN, LAWS OF.

The laws of Spain were not abrogated by the transfer of the territory of Orleans to the United States, but the commercial law of the latter became, by that transfer, the law of the territory of Orleans. *Wagner v. Kenner*, 120.

STATUTES, CITED, EXPOUNDED, &c.

- I. *Statutes of the United States.*
- II. *Statutes of the State.*

I. *Statutes of the United States.*

- 1790, May 26. Authentication of judicial proceedings from other States. *Goodman v. James*, 297.
- 1811, March 3, § 5. Adjustment of land claims and sale of public lands in territories of Orleans and Louisiana. *Kittridge v. Breaud*, 40. *Kittridge v. Landry*, 72.
- 1820, May 11, § 7. Adjustment of land claims in Louisiana. *Ib.* 40, 72.
- 1823, February 28, § 1. Reviving for limited time act of 11 May, 1820, relative to land claims in Louisiana. *Ib.* 40. 72.

- 1832, June 15. Authorizing inhabitants of Louisiana to enter back lands. *Kittridge v. Dugas*, 85.
- 1834, June 19. Pre-emption rights of settlers on public lands. *Kittridge v. Breaud* 40.
- 1835, February 24. Extending time allowed by act of 15 June, 1832, to enter back lands in Louisiana. *Kittridge v. Dugas*, 85.

II. Statutes of the State.

- 1805, February 17. Incorporating city of New Orleans. *First Municipality of New Orleans v. Orleans Theatre Co.*, 209.
- , April 10. Sale under *fiat facias*. *Drouet v. Rice*, 374.
- 1816, March 7. Acquisition of residence. *State v. Judge of Court of Probates of New Orleans*, 449.
- , March 14. Amending charter of city of New Orleans. *First Municipality of New Orleans v. Orleans Theatre Co.*, 209. *Same v. McDonough*, 244.
- 1817, February 20. Voluntary Surrender—rights of mortgage creditors. *Egerton, &c. v. Their Creditors*, 201. Application of syndics to sell property (§ 30.) *Lange v. Creditors*, 539.
- 1818, March 16. Acquisition of residence. *State v. Judge of Court of Probates of New Orleans*, 449.
- 1826, March 22. Neglect or refusal of attorney at law to pay over money. *Oakey v. Duncan*, 349.
- , March 29. Voluntary Surrender. *Rivas v. Hunstock*, 187. *Egerton v. His Creditors*, 201.
- , April 1, § 2. Repealing art. 2410 of the Civ. Code, so far as inconsistent with art. 125, relative to powers of wife separated from bed and board. *Bonneau v. Poydras*, 1.
- , April 7, § 17. Amending Code of Practice—failure of sheriff to return writs, or pay over money. *Destréhan v. Garcia*, 291.
- 1830, March 11. Tutors and curators of minors—special mortgage. *Barnard v. Erwin*, 407.
- 1831, February 8. Roads, levées, bridges, &c., authority of Police Juries of certain parishes relative to. *Police Jury of Pointe Coupée v. Gardiner*, 139.
- , March 25, § 3. Amending Code of Practice—injunction. *Walden v. City Bank of New Orleans*, 165. *First Municipality of New Orleans v. Orleans Theatre Co.*, 209.
- , March 25. Trial by jury. *Lyon v. Commercial Insurance Co.*, 266.
- 1832, April 2, § 29. Charter of the Union Bank of Louisiana—transfer of stock. *Union Bank of Louisiana v. Desban*, 486.
- , April 2. Opening and improvement of streets and public places in New Orleans. *Application of Mayor, &c. of New Orleans for extension of Barrack street*, 491.
- 1833, April 1. Prohibition of lotteries. *Davis v. Caldwell*, 271.
- 1834, January 2, § 3. Slaves—presumption where redhibitory maladies dis-

- covered within fifteen days after sale of one not eight months in the State. *Lyons v. Kenner*, 50.
- 1834, March 10, § 4. Relative to advertisements—prescription against informalities in sales by public officers. *Drouet v. Rice*, 374. *Walden v. Canfield*, 466.
- 1835, April 1, § 25. Charter of New Orleans Gas Light and Banking Company—suspension of specie payments. *State v. New Orleans Gas Light and Banking Co.*, 529.
- 1836, March 8. Division of city of New Orleans into Municipalities. *First Municipality of New Orleans v. Orleans Theatre Co.*, 209. *Same v. McDonough*, 244.
- , March 14. Charter of Orleans Theatre Company. *First Municipality of New Orleans v. Orleans Theatre Co.*, 209.
- 1837, March 11. Amending charter of Orleans Theatre Company. *Ib.*
- , March 13, § 3, 4, 7. Voluntary surrender and Settlement of Successions—as to failure of syndics, curators, executors, &c., to deposit money in bank, (§ 3, 4,) see *Yard &c. v. Their Creditors*, 400; as to their term of service, (§ 7,) see *Tait v. Lewis*, 351.
- 1838, March 10, § 4. City Court of New Orleans—jurisdiction of Presiding Judge in actions by landlords. *Kennedy v. Downey*, 284.
- , March 12. Amending act 1 April, 1833, prohibiting lotteries. *Davis v. Caldwell*, 271.
- 1839, March 14, § 1, 3. Banks—suspension of specie payments (§ 1); payments of balances to each other (§ 3). *State v. New Orleans Gas Light and Banking Co.*, 529.
- , March 20, § 13. Amending Code of Practice—interrogatories to third persons under *fi. fa.*, and liability of property in their hands or debts due by them. *Taylor v. Whittemore*, 99. *Bank of Alabama v. Hozey*, 150. *Cucullu v. Union Insurance Co.*, 571.
- 1840, March 6. Composing and drawing Juries out of First District. *Lyon v. Commercial Insurance Co.*, 266.
- , March 18. Creating office of Sheriff of Commercial Court of New Orleans. *Roman v. Peters*, 479. *Gardere v. Hozey*, 568.
- , March 28. Abolishing imprisonment for debt. *Whitney v. Lyon*, 37. *Ex parte Lafonta*, 495.
- 1842, March 16. Explaining art. 924 of the Code of Practice—successions of absentees and powers of Courts of Probate. *Succession of Henderson*, 391.
- , March 26, § 2. Credit of the State—Clinton and Port Hudson Railway Company. *State v. Judge of Third District*, 307.

STEAMER.

See SHIPPING.

SUBROGATION.

See SURETY, 3. 4. 5.

SUBSTITUTION.

There is nothing in the laws of this State to prevent property from being held in trust for the use of another, where all parties interested assent; and such naked trust, to be executed within a reasonable period, does not amount to a substitution. *Malone v. Barker*, 369.

SUCCESSIONS.

I. *Appointment, Responsibility, and Compensation of Executors, Administrators, and Curators.*

II. *Of Heirs and Legatees, and of the Sale of Property and Payment of Debts and Legacies.*

I. *Appointment, Responsibility, and Compensation of Executors, Administrators, and Curators.*

1. Where the accounts of an executor have been homologated, he can no longer be held responsible for payments made by him under the orders of the Court of Probates. Should the heir discover that payments have been made which were not due, his recourse, if he have any, is by an action *condictio indebiti*, against the party who has received what he was not entitled to; and where such payments have been made to the executor for commissions alleged to have been illegally allowed, an action to recover them may be brought against him, individually, before a court of ordinary jurisdiction. The defendant is no longer executor, nor is he sued as such.

Baldwin v. Carleton, 54.

2. An action may be maintained against an executor for a debt due by the succession, after a judgment recognizing the heirs and ordering them to be put in possession of the estate and homologating an account rendered by him, when it is not shown that the judgment recognizing the heirs and ordering them to be put in possession was ever executed or that the executor ever delivered up the property belonging to the succession, where the account appears on its face not to have been a final one, and there is no proof that the executor prayed to be, or ever was, discharged. *Tait v. Lewis*, 351.

3. A married woman, not separated in property, cannot accept the office of testamentary executrix, without the consent of her husband (C. C. 1657); nor can she, after acceptance, appear in court in the execution of the trust, without the authority and assistance of the latter. The cases provided for by arts. 125 of the Civil Code, and 106 of the Code of Practice, are the only exceptions to the general rule prescribed by art. 123 of the Civil Code, that a wife cannot appear in court without the authorization of her husband.

Dussumier v. Coiron, 368.

4. Notice of an application for the appointment of dative testamentary executor must be given in all cases, in the same manner as on an application for the appointment of an administrator. The publication of such notice has not been dispensed with by the act of 16th March, 1842.

Succession of Henderson, 391.

5. The act of 16 March, 1842, relative to executors, administrators, and curators, explanatory of art. 924 of the Code of Practice, was intended to have a future, not a retrospective operation. *Ib.*
6. The penalty imposed by the act of 13th March, 1837, section 3, on curators, executors and administrators, for failing to comply with its provisions in regard to the depositing in bank of money belonging to the estate administered, is for the benefit of the estate, and not of any individual creditor. *Yard, &c. v. Their Creditors* 11.
7. Where the heirs are present the succession is not vacant, and no curator can be appointed to it. *Succession of Cunningham*, 3.
8. An executor is entitled to a commission of two and a half per cent on the whole amount of the inventory, after deducting bad debts and unproductive property. The price for which the property comprised in the inventory may sell, is not the standard by which his commissions are to be calculated. *Succession of De Armas*, 445.

SEE APPEAL, 12.

II. Of Heirs and Legatees, and of the Sale of Property and Payment of Debts and Legacies.

9. Where the rights of a party to a succession, consist only in a right to a portion of the proceeds of the sale of the property, either in money, or in notes given for the price, it will be considered purely moveable; and this, though the notes should be secured by mortgage on the real estate sold. *C. C. 466, 467. Bonneau v. Poydras*, 1.
10. The provision of art. 463, of the Civil Code, making an action for the recovery of an entire succession, an immoveable, relates only to the action given to the heir to recover an entire succession in kind, such as it existed at the time it was opened. It does not apply to an universal legatee, or legatee under an universal title, limited to claiming the moveable part of a succession, or a portion of the residue thereof, and not entitled to take possession of the estate in kind, in the condition in which it was at the opening of the succession. *Ib.*
11. By art. 2602 of the Civil Code, all the warranties to which private sales are subject, exist against the heirs in judicial sales of the property of successions. *Aliter*, as to the creditors, on the sale of the property surrendered by an insolvent. The heirs are warrantors to the fullest extent, being owners and vendors, while the creditors are neither. The latter are only responsible, severally, for the restitution of the proceeds of the sale of the property received by them. *Rivas v. Hunstock*, 187.
12. The purchaser, at a judicial sale of the property of a succession sold for a debt due by the ancestor, will, where the proceedings have been fairly conducted, acquire a title good against an heir who may subsequently make himself known. *Wherry v. Bell*, 225.
13. An heir to whose benefit the payment, by a third person, of a debt due by the ancestor, has enured, will be bound to refund the amount. *Ib.*

14. Heirs of full age may make an extra-judicial partition of the property coming to them. So the legatees may compound, or give a valid discharge.
Succession of Morgan, 354.
15. A testator, owing no debts, directed his property to be turned into cash, and bequeathed the residuum, after the payment of certain legacies, to a trustee, for the propagation of the Christian religion. The heirs and legatees, being all of age, and the trustee, for the purpose of saving expense and to avoid a sale of the property at an unfavorable period, agreed to a division in kind, and the executors prayed that an account and partition, made in conformity to such agreement, should be homologated, and the degree taken as a final settlement and partition of the estate, to which no opposition was made. *Held*, that the heirs had a right to enter into such a compromise; that the trustee, being responsible only to the heirs for the manner of executing the will of the testator, was authorized, by their consent, to agree to the arrangement; and that the compromise, not being one reprobated or prohibited by law, should be carried into effect. *Ib.*
16. A judgment ordering a certain sum belonging to a succession, in the hands of the executors, to be appropriated in a particular way, is not binding on a legatee not a party to the proceeding. *Succession of Milne, 382.*
17. The bequest of a sum of money for a specified purpose, is a particular legacy. Such legacies are a charge upon the whole estate, and become the personal debt of the heir, and must be discharged in preference to all others, as if debts of the estate, though they exhaust the whole succession, or all that remains after the payment of the debts, and the contribution for the legitimate portions where there are forced heirs. C. C. 1627, 1661. *Ib.*
18. Universal legatees are bound, personally, not only for the debts and charges of the succession, but to discharge all the legacies, unless in case of reduction (C. C. 1603); and where they wish to take the seisin of the succession from the testamentary executor, they must offer him a sum sufficient to pay the moveable legacies. C. C. 1664. *Ib.*
19. In regard to the creditors of a succession, the administration of the assets and the payment of the debts of the deceased must be governed exclusively by the law of the country where the administrator or executor acts, and from which he derives his authority to collect the assets. No provision of the will could subject him to the necessity of seeking payment elsewhere. Otherwise, as to legatees, who have no claims against the succession but such as the testator pleased to give them, who might make his bounty conditional. They must take their legacies, if at all, *cum onere*.

Succession of Mary, 438.

SURETY.

1. One who becomes bail for another, on a guaranty from a third person to indemnify him for any loss he may be subjected to in consequence, is under no obligation to notify the latter of any steps taken to render him liable.
Fisk v. Comstock, 125.
2. Bail may coerce the surrender of their principal. *Ib.*
3. The obligations of co-sureties to pay their portions to the surety who has

- paid the whole debt, and the proportion in which they are bound to pay, depend upon the law, and not upon the contract. They are bound, severally, to pay their respective proportions, and the surety who has paid the whole debt is subrogated to the rights and actions of the creditor, and entitled to recover the rate of interest which he paid. *Rothschild v. Bowers*, 380.
4. Under art. 2157 of the Civil Code, subrogation will take place, of right, in favor of one who has paid the debt he was interested in discharging : *first*, where he was bound *for* another ; *secondly*, where he was bound *with* another ; and *thirdly*, where he was bound *for the same debt for which another was bound*. The two first cases are provided for expressly ; and subrogation will be implied in favor of the person bound for the debt for which another was bound, on the presumption that he was induced to bind himself in consequence of the responsibility of the principal having been guarantied by the party first bound. *Ib.*
 5. He who is bound *for* another, or *for the same debt* as another, and pays the creditor, is subrogated to all the rights of the latter against the principal ; but as to those *with whom* he is bound, he will be subrogated only for their virile portions. *Ib.*
 6. Where security is required to be given by order of court, the person offered must be a resident of the State. *Ib.*
 7. The sureties on a bond given for the release of property attached, the condition of which is that they shall satisfy whatever judgment may be rendered in the suit, though not parties to the action, may plead the nullity of the judgment, when called upon to satisfy it. Their undertaking was, to satisfy any judgment legally obtained. When a judgment is absolutely null, any one having the least interest in opposing its effect, may have such nullity pronounced. *Quine v. Mayes*, 510.
 8. The liability of a surety in an official bond, attaches from the moment the principal is in default. *Dougherty v. Peters*, 534.
 9. In an action against the sureties of a public officer to recover an amount due to the plaintiffs from the latter, judgment should be rendered for the sum actually due, and not for the whole penalty of the bond to be satisfied by the payment of the amount so due. *Ib.*
 10. Where several courts have concurrent jurisdiction of actions against the sureties of a public officer, no one of them can condemn the sureties to bring into court the amount for which they may be ultimately responsible, and discharge them from further liability. The creditors cannot be compelled to come into that tribunal for redress. The judgment should be only, for the amount due to the plaintiff. *Ib.*
 11. Where the sureties of a public officer bind themselves, severally, for a specific sum, they can in no event be made liable for a larger amount ; but any one injured by the misfeasance of their principal, will have an action against each and all, until the whole amount for which they may be respectively bound shall be exhausted, or the claim satisfied. *Ib.*

See APPEAL, 11. 12. BAIL. PRISON BOUNDS, BOND TO KEEP.
SEQUESTRATION, 1. SHERIFF, 5. 8. 9.

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TRUST.

1. There is nothing in the laws of this State to prevent property from being held in trust for the use of another, where all parties interested assent ; and such a naked trust, to be executed within a reasonable period, does not amount to a substitution. *Malone v. Barker*, 369.
2. A trustee, who claims property in this State, under a deed of trust executed in another for the benefit of a third person, will not forfeit his rights thereto by granting a delay to the debtor, any more than a mortgage creditor by giving time to his debtor. *Ib.*

TUTOR AND UNDER TUTOR.

See MINOR, II. V.

USURY.

1. A third person, not a creditor, having advanced money to defendants, at an usurious interest, on certain articles held as security for its re-payment, which advances were applied to the benefit of the creditors of the latter, on a seizure by plaintiffs under an execution against defendants : *Held*, that such third person ought to lose the usurious interest exacted by him ; and that the difference between the sum advanced and the real value of the articles, is all that was liable to seizure. *Taylor v. Whittemore*, 99.
2. By the laws of this State, a contract tainted with usury, is voidable only as to the usurious interest, and valid as to the principal.

Walden v. City Bank of New Orleans, 165.

VENIRE FACIAS.

See JURY, 5.

WARRANTY.

See PLEADING, 31. SALE, IV.

WILL.

See DONATIONS MORTIS CAUSA.

END OF VOLUME II.

ERRATA.

Page 2, line 15 from top, for *recession*, substitute *rescission*.

" 16, " 16	" 462,	" 463.
" 92, " 8	" <i>plaintiffs</i> ,	" <i>plaintiff</i> .
" 95, " 28	" <i>causes</i> ,	" <i>cases</i> .
" 99, " 2	" 15,	" 13.
" 139, " 13	" 28	" 8.
" 150, " 34	" in whatever amount,	substitute on whatever [account.
" 181, " 6	" <i>himself</i> ,	substitute <i>he</i> .
" — " 11	" <i>execution</i> ,	" <i>injunction</i> .
" 291, " 4	" 7,	" 17.
" 299, " 7	" <i>is</i> ,	" <i>are</i> .
" 303, " 7	" <i>Perox</i> ,	" <i>Peyroux</i> .
" 319, " 7	" <i>judicial rule</i> ,	" <i>judicial sale</i> .
" 332, " 2	" <i>to</i> ,	" <i>in</i> .
" — " 10	" <i>or</i> ,	" <i>and</i> .
" 394, " 22	" 42,	" 300.
" 550, " 3	" <i>or exclusively</i> ,	" <i>is exclusively</i> .
" 571, " 10	" <i>was</i> ,	" <i>were</i> .

NEW YORK: PRINTED BY A. S. GOULD.

